No. 82-1412

Office-Supreme Court, U.S.
FILED
FEB 23 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC. d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

—against—

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 23, 1983

Questions Presented

1. The Union Pacific Railway was granted a railroad franchise and millions of acres of land by the United States under the Pacific Railroad Act of 1862 subject to obligations and limitations set forth, *inter alia,* in Section 3 of that Act. The Union Pacific Railroad succeeded to the railroad franchise and lands of the Union Pacific Railway through a mortgage foreclosure proceeding. The Court of Appeals for the Tenth Circuit held that as a result of the foreclosure, the Union Pacific Railroad took the land free from the obligations and limitations imposed by Congress in Section 3 of the Act. The first question for review is:

> Did the Court of Appeals correctly decide, notwithstanding this Court's rulings in *United States* v. *Northern Pacific Ry.,* 311 U.S. 317 (1940) and *Oregon & California R.R.* v. *United States,* 238 U.S. 393 (1915) and 243 U.S. 549 (1917), that as a result of the foreclosure proceeding the Union Pacific Railroad was no longer subject to the obligations and limitations imposed by Section 3 of the Pacific Railroad Act of 1862?

2. Wyoming, as well as 23 other states, has enacted the Federal Court State Law Certification Procedure Act, permitting federal courts to ascertain the answer to unresolved issues of state law by certifying those issues to the highest court of the State. An application was made to the Court of Appeals for the Tenth Circuit to certify an unresolved issue of Wyoming real property law to the Wyoming Supreme Court. Notwithstanding that the State of Wyoming had itself set forth its view in a related case that the issue should be certified and that the decision of the Wyoming Supreme Court, when it passed on the question, would

likely be contrary to that of the federal district court, the Court of Appeals refused to certify the issue and affirmed the ruling of the district court. The second question for review is:

> Should this Court, in the exercise of its supervisory power, review the refusal of the United States Court of Appeals to certify an unresolved question of Wyoming real property law to the Wyoming Supreme Court when the determination as to the nature of Wyoming law substantially affects recurring questions as to ownership rights to oil and natural gas on vast tracts of Wyoming land?

Parties Below

The parties participating below were Moench Investment Company, Ltd. ("Moench") and Thousand Peaks Ranches, Inc. ("Thousand Peaks"), appellants, and Union Pacific Land Resources Corp., Champlin Petroleum Company and Amoco Production Company, appellees.

Pursuant to Rule 28.1 of the Rules of this Court, the Court is informed that petitioner Moench, a limited partnership, own all of the outstanding stock of the petitioner Thousand Peaks. Thousand Peaks has no subsidiaries and no corporate affiliates other than Copper State Financial Corp., Burton-Hawks, Inc. and other corporations whose stock is wholly owned by Moench.

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 696 F.2d 88 and is set forth in the appendix to this petition commencing at p. 1a. The "Order Sustaining Motions for Summary Judgment and Summary Judgment" of the United States District Court for the District of Wyoming (Kerr, J.), affirmed by the Tenth Circuit, is reported at 495 F.Supp. 876 and is set forth in the appendix commencing at p. 11a.

Jurisdiction

The judgment of the Court of Appeals affirming the grant of summary judgment to respondents was filed on December 14, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) (1976).

Statutory Provisions

Sections 3 and 15 of the Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489, as amended by Act of July 2, 1864, ch. 216, 13 Stat. 356, are reproduced in the statutory appendix commencing at p. 1s. The full text of the Wyoming "Federal Court State Law Certificate Procedure Act", Wyo. Stat. §§ 1-13-104 *et seq.* (1977), and Rule 11 of the Wyoming Rules of Appellate Procedure are set forth in the statutory appendix commencing at p. 4s.

Statement of the Case

In this case petitioners hold the undisputed right to and occupy the surface of certain parcels of land located in Wyoming, part of an oil-rich area of the Rocky Mountains. Petitioners and respondents, corporate subsidiaries of Union Pacific Corporation ("Union Pacific") and their lessee, Amoco Production Co. ("Amoco"), assert that they have title to the subsurface, including oil and gas, underlying those lands. Respondents' claim to title to the subsurface is based on the terms of 1908 and 1909 deeds from the Union Pacific Railroad to petitioners' predecessors in title, which purported to reserve "all coal and other minerals" to the Union Pacific Railroad.[1] Petitioners maintain

[1] These deeds resulted from installment-sale contracts entered into in 1897 and 1899.

that such reservations are invalid under Section 3 of the Pacific Railroad Act and hence that the Union Pacific Railroad conveyed the entirety of its interests notwithstanding the purported reservations. Petitioners also assert that, quite apart from the commands of Section 3, a reservation of "coal and other minerals" was not intended to, and under the circumstances present here did not, reserve to the Union Pacific Railroad oil and natural gas as a matter of Wyoming law.

Each of the parcels held by petitioners and at issue here is located on odd-numbered sections of the land grant originally made available by the United States to the Union Pacific Railroad (or its successors) to aid in the construction of a railroad to the Pacific under the Pacific Railroad Act of 1862 (hereinafter "The Act" or "The Pacific Railroad Act") (ch. 120, 12 Stat. 489, amended by Act of July 2, 1864, ch. 216, 13 Stat. 356). Known mineral lands, other than coal and iron lands, were excluded from the grant. Congress also specified, in a proviso to Section 3 (hereinafter sometimes referred to as the "settlement and preemption proviso"), that:

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (A. 1a)[1]

Under the terms of both the Homesteading Act—passed only months prior to the Pacific Railroad Act—and the preemption laws, homesteaders and preemptors were to

[1] References to "A.—" are to the appropriate pages of the appendix to this petition.

receive titles in fee simple. Neither act authorized preemption or homesteading of either a mineral or surface estate carved out of the fee and no basis for preemption or homesteading of such a divided interest existed.

The original Union Pacific Railroad merged with a number of other lines, and the surviving entity was known as the Union Pacific Railway Company (the "Railway"). In 1893 a receiver was appointed for the Railway, and in a series of mortgage foreclosure proceedings in 1897-9, the railroad franchise and lands granted to the Railway by the Act ("land grant lands") were transferred to the Union Pacific Railroad (the "Railroad"). The principal consideration in the transfer in foreclosure consisted of bonds issued by the old Railway which were turned in by the holders thereof in exchange for stock in the new Railroad.[1] The Railroad continued to operate the business of the Railway without interruption and continued to receive land from the United States under the Act. The Act, by the terms of Section 15 thereof, extended to and bound "successors and assigns" of the original railroad company. (A. 3s)

Prior to 1884, when the Union Pacific Railway sold land grant land it did so without attempting to reserve any subsurface interests. In 1884 it began to reserve rights to prospect for coal and other minerals. During the period from 1897-1909 alone the Union Pacific Railway and Railroad used more than 30 differing subsurface reservation clauses in conveying the land. In some reservation forms, "oil" or "oil and gas" were explicitly reserved; in others, the words "oil" or "gas" were inserted by hand on a printed form providing for a reservation of only "coal and other minerals;" in still others, including all of the reservations

[1] The Union Pacific has itself referred to this process as a "reorganization." *See Union Pacific R.R.* v. *United States*, 524 F.2d 1343, 1363-66 (Ct. Cl. 1975) *cert. denied*, 429 U.S. 827 (1976).

at issue in this action, "coal and other minerals" were reserved with no reference, handwritten or otherwise, to "oil" or "gas."[4] The Railroad has taken the position, however, that each of the reservations, including the reservation of "coal and other minerals" without reference to "oil" or "gas," has identical legal effect and is sufficient to retain a fee interest in oil and natural gas.

According to the Railroad's calculation, it or its affiliates continue to hold both surface and subsurface rights to approximately one million acres of the original land grant. Additionally, in excess of 6,920,000 acres (including the lands at issue in this litigation) is asserted by the Railroad to be subject to one or another subsurface reservations and still held by Union Pacific or its affiliates.[5]

In 1969, Amoco contracted with the Railroad to engage in possible oil and gas exploration on the lands at issue. In the 115 years prior to the institution of this lawsuit the record reflects no drilling or other development of the subsurface of these lands by the Railroad or Amoco.

Proceedings Below

This diversity action (28 U.S.C. § 1332 (1976)) was commenced by respondents in the United States District Court

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[4] One computer record produced in a parallel action by Upland Industry, a Union Pacific subsidiary, includes more than sixty forms of reservations used by the Railway or Railroad. The form reflects 26 different forms of reservations of "coal and other minerals." An entirely separate grouping of 17 reservations is headed "oil, coal and other minerals." Some of these refer explicitly to natural gas. A listing of the more than sixty differing forms of reservations as reflected in the Union Pacific's records is set forth in the Appendix at p. 25a.

[5] Brief of Appellees Union Pacific Land Resource Corporation and Champlin Petroleum Company, submitted to The Tenth Circuit at p. 30, n. 2; Summary of Upland Industry Holdings (1977). (A. 27a)

for the District of Wyoming in June, 1979. Petitioners answered and counterclaimed, asserting the invalidity of the subsurface reservations under Section 3 of the Pacific Railroad Act, an Act whose interpretation had been put at issue by the complaint. Several months previously, the petitioners had commenced their own quiet title action in the Wyoming state courts which raised the same issue of Wyoming law (theretofore and to this date undecided by the Wyoming courts) as to the correct interpretation of a reservation of "coal and other minerals." Union Pacific and Amoco removed the earlier commenced state action to the Wyoming district court where it was assigned to the Judge (Hon. Ewing T. Kerr) hearing this case and where it was stayed pending the resolution of this case.

In January, 1980, respondents moved for summary judgment; the district court granted the motion in a brief memorandum decision in August, 1980.[6] (A. 11a) The district court disposed of the Wyoming law issue as to the proper interpretation of the reservations of "coal and other minerals" by relying on its own earlier decision in which it had held such reservations to be unambiguous under Wyoming law as to the inclusion of oil and gas and hence not to be subject to construction through extrinsic evidence. *Amoco Production Co.* v. *Guild Trust*, 461 F.Supp. 279 (D.Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980), *cert.*

[6] Petitioners opposed the motion, *inter alia*, as premature, noting that discovery was ongoing in a series of prior-commenced actions involving these parties, among others, pending in the United States District Court for the District of Utah which raised the issue of the validity of the subsurface reservations under Section 3 of the Act as well as issues of Utah law. *Anschutz Land and Livestock Co.* v. *Union Pacific R.R.*, No. C-77-0390(J) (D. Utah); *Antelope Island Cattle Co.* v. *Union Pacific Corp.*, No. C-77-0389(J) (D. Utah). Leave was sought to incorporate discovery material from those actions in this and to defer acting on summary judgment until such time as discovery was completed in the Utah actions. The district court did not rule on these requests prior to granting the motion for summary judgment.

denied, 452 U.S. 967 (1981) (*"Guild I"*). In that decision the district court, while acknowledging that the Wyoming Supreme Court had not interpreted this type of reservation, adopted a rule excluding all extrinsic evidence.

In its disposition of the instant case, the district court recognized that its earlier decision in *Guild I* had not dealt with the impact of the settlement and preemption proviso of Section 3 of the Pacific Railroad Act. Petitioners argued that by selling surface rights in the land, while at the same time purporting to retain mineral or other subsurface rights, the Railroad had acted in a manner inconsistent with Section 3; that the purported subsurface reservations were consequently invalid and that a full fee interest had passed as a matter of law. The district court disposed of the Section 3 argument in a single sentence (A. 13a) by reference to two decisions of this Court, neither of which was directed to an interpretation of the settlement and preemption proviso.[7]

An appeal was taken to the Tenth Circuit, which was also asked to certify the question of Wyoming law to the Wyoming Supreme Court pursuant to the Wyoming "Federal Court State Law Certificate Procedure Act." The Tenth Circuit affirmed the decision granting summary judgment and did not certify the disputed question of Wyoming law to the Wyoming Supreme Court.

The Court of Appeals provided a somewhat more detailed explanation for rejecting petitioners' argument as to Section 3 of the Pacific Railroad Act than had the district court. After discussing the possible effect of the requirement of Section 3 that the railroad sell or dispose of the lands within the specified period or hold them open to

[7] The decisions were *Burke* v. *Southern Pacific R.R.*, 234 U.S. 669 (1914) and *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979).

settlement and preemption, the court held that the provision had been satisfied and that the reservations were valid because "the lands at issue *were* 'sold or disposed of . . . within three years' of the railway's completion" (emphasis in original). 696 F.2d at 92. (A. 8a) The basis for this conclusion was that "the lands were in fact sold upon foreclosure of the mortgages" and that the lands consequently "were not then and are not now subject to the settlement and preemption clause." *Id.*

The Court of Appeals did not cite or otherwise refer to this Court's holding in *United States* v. *Northern Pacific Ry.*, 311 U.S. 317 (1940), in which the Court held a settlement and preemption clause had been violated notwithstanding a similar foreclosure transfer. Nor did the court even advert to the decisions of this Court in *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915) and 243 U.S. 549 (1917), in which, in the context of construing other railroad land grant statutes, this Court had expressly rejected the contention that "the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos." 238 U.S. at 435. These cases had been briefed and argued to the court by both petitioners and respondents.

Similarly, although recognizing both that "Wyoming substantive law governs" the interpretation of the subsurface reservations (696 F.2d at 93) (A. 10a) and that "no Wyoming state court has passed upon the issue" (*id.*) the court declined, without explanation, to certify the issue to the Wyoming Supreme Court. Instead, basing its decision explicitly on the district court's interpretation of the reservation in the earlier *Guild I* case, *supra*, and its own affirmance thereof, the Court of Appeals again proceeded to offer its "Erie-guess" as to how the Wyoming courts would resolve the matter. The court did not note that a

motion for certification and/or abstention had been made, as well, in the earlier *Guild I* case to which petitioners were not parties. Nor did it note that the State of Wyoming had emphasized, in support of that motion that:

> "Resolution of the issues presented in this case will directly affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens. It would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders. Clearly, the issue presents a substantial question of public policy and concern and the exercise of federal jurisdiction could be disruptive of the State's efforts to establish a coherent, uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas. As noted in Appellant's memorandum, conservation and revenue production are major concerns to the State. The question is basic: ownership of Wyoming real property." (A. 19a-20a)[8]

The brief submitted on behalf of the State of Wyoming pointed out that a Wyoming court could finally resolve the real property issue, whereas a federal "forecast" was "not of controlling precedential value" and could not provide "the benefit of stability, uniformity and certainty in an area of law that directly, substantially and vitally affects" the "lives and fortunes" of the "State of Wyoming and its citizens." (A. 20a) The Wyoming brief then stated:

> "It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court

[8] A copy of this brief and the motion of the State of Wyoming for leave to file it in support of a motion for abstention or, in the alternative, for certification are included in the Appendix to this petition commencing at p. 15a.

> of the State of Wyoming would likely differ from the decision of the District Court below in this case." (A. 23a)

Without explanation, the Tenth Circuit denied Wyoming leave even to file its brief in *Guild I* and denied the motion for certification in that case, as in this.

The Court of Appeals' decision in this case was filed on December 14, 1982. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit's Decision Resolves An Important Question of Federal Statutory Interpretation Affecting Title to Millions of Acres of Western Land in a Manner Inconsistent With This Court's Decisions in *United States* v. *Northern Pacific Ry.* and *Oregon & California R.R.* v. *United States.*

It was petitioners' contention before the Court of Appeals, as it is here, that the settlement and preemption proviso of Section 3 of the Pacific Railroad Act of 1862, as amended in 1864, renders invalid the attempt of the Union Pacific Railway and its successor to retain the subsurface of land grant lands made available under Section 3 of the Act. That proviso required:

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." (A. 1s)

The Court of Appeals considered the argument and rejected it on the ground that the clause had been complied with here, *i.e.*, that the transfer of the land grant lands from the Union Pacific Railway to the Union Pacific Railroad as a part of the foreclosure of mortgages on the Railway, constituted the sort of sale which freed the Railroad of the obligations and limitations of the Section 3 proviso of the Act. 696 F.2d at 92-93. (A. 8a-9a)

The Court of Appeals recognized that this question had not been decided in this Court's examination of the settlement and preemption proviso of the Pacific Railroad Act in *Platt* v. *Union Pacific R.R.*, 99 U.S. 48 (1878). 696 F.2d at 92. (A. 8a) However, the court neither discussed nor otherwise considered decisions of this Court in which other railroads had urged upon this Court precisely the argument offered by respondents here in connection with their land grant statutes—nor that in each case the railroad's argument had been rejected and the successor railroad held bound to fulfill the limitations imposed upon it by Congress notwithstanding the transfer through mortgage foreclosure proceedings. It is these circumstances and the importance of the question of title to the subsurface underlying millions of acres of land grant lands in the West which make this issue one worthy of review by this Court.[9]

* * *

[9] *See Leo Sheep Co.* v. *United States*, *supra*, 440 U.S. at 678 ("Because this holding affects property rights in 150 million acres of land in the Western United States, we granted *certiorari*"); *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980) ("Because the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands, we granted *certiorari*.")

The workings of the various railroad land grant acts have been a frequent and continuing source of litigation before this Court. *See Leo Sheep Co.* v. *United States*, *supra*; *United States* v. *Union Pacific R.R.*, 353 U.S. 112 (1957); *Great Northern Ry.* v. *United States*, 315 U.S. 262 (1942); *United States* v. *Northern*

The Pacific Railroad Act of 1862, as amended in 1864, provided the framework for construction of a transcontinental railroad; it also established the terms for the distribution of millions of acres of theretofore public lands first to the new railroad created under the Act and thence—or at least so Congress envisioned—to others who would develop those lands.

Congress was acutely concerned about allowing millions of acres of the land to repose in the railroad corporation authorized under the Act. Put simply, as this Court has recognized, there existed a clear "governmental policy of guarding against monopolies of public lands by large corporations or single individuals." *Platt* v. *Union Pacific R.R., supra,* 99 U.S. at 64.[10] In 1872 this Court noted of the Act:

Pacific Ry., 311 U.S. 317 (1940); *Southern Pacific Co.* v. *United States*, 307 U.S. 393 (1939); *Central Pacific Ry.* v. *Alameda County*, 284 U.S. 463 (1932); *Fullinwider* v. *Southern Pacific R.R.*, 248 U.S. 409 (1919); *Oregon & California R.R.* v. *United States*, 243 U.S. 549 (1917); *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915); *Burke* v. *Southern Pacific R.R., supra; Missouri Valley Land Co.* v. *Wiese*, 208 U.S. 234 (1908); *Northern Pacific Ry.* v. *Soderberg*, 188 U.S. 526 (1903); *Tarpey* v. *Madsen*, 178 U.S. 215 (1900); *Northern Pacific Ry.* v. *Myers*, 172 U.S. 589 (1899); *Menotti* v. *Dillon*, 167 U.S. 703 (1897); *Barden* v. *Northern Pacific R.R.*, 154 U.S. 288 (1894); *Deseret Salt Co.* v. *Tarpey*, 142 U.S. 241 (1891); *Kansas Pacific Ry.* v. *Dunmeyer*, 113 U.S. 629 (1885); *Platt* v. *Union Pacific R.R., supra; United States* v. *Union Pacific R.R.*, 98 U.S. 569 (1878); *Missouri, Kansas and Texas Ry.* v. *Kansas Pacific Ry.*, 97 U.S. 491 (1878); *Railway Co.* v. *McShane*, 89 U.S. 444 (1874).

[10] The Court's understanding of the congressional intent was well founded in legislative history. The settlement and preemption proviso was designed specifically to avoid a perpetual retention by the railroad of the lands granted to it by the United States. This objective was clearly articulated by one of the supporters of the Pacific Railroad Act, Senator Pomeroy, who was the co-author of this proviso. In debating whether or not to include a similar provision (which ultimately was adopted) in proposed legislation pertaining to the Northern Pacific railroad line,

"It is wisely provided, that these lands shall not be used by the company as a monopoly of indefinite duration. The policy of the government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that *all of it* should be open to settlement and cultivation. Looking to this policy, and to the very large quantity of lands granted by this statute to a single corporation, Congress declared that if the company did not sell those lands within a time limited by the act they should then, without further action of the company, or of Congress, be open to the actual settler under the same laws which govern the right of preemption on government lands, and at

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Senator Pomeroy responded to his colleagues' concern that a land grant would unduly aggrandize the proposed railroad by discussing the operation of the Pacific Railroad Act:

"What were the conditions of [the Pacific Railroad Act] land grant? The Senator says they make a monopoly which [the Railroad] will hold from generation to generation. I wish to read one of the provisions of that law . . . [quoting the settlement and preemption proviso] . . . .

* * *

"That road has now been completed two years; . . . every acre which remains unsold three years after that road is completed is subject to preemption and settlement like other public lands . . . . Where is the opportunity for a company to grow up as a great-land monopoly under such a provision as this?

* * *

"But I submit that the old provision which I insisted upon in the Pacific railroad act, and which I will read again—[quoting the settlement and preemption proviso] will prevent any landed monopoly of a railroad company. They have got to find settlers to take the lands within three years after the road is completed; and if they do not do that, then they are to be open to settlement at $1.25 an acre." Cong. Globe, 41st Cong., 2d Sess. 2483-84 (1870).

> the same price. Any one who has ever lived in a community where large bodies of lands are withheld from use, or occupation, or from sale except at exorbitant prices, will recognize the value of this provision. It is made for the public good, as well as for that of the actual settler." *Railway Co.* v. *Prescott*, 83 U.S. 603, 609 (1872) (emphasis in original)[11]

And in 1878, in the *Platt* decision, this Court, while emphasizing that the dominant purpose of the Act was to have "the road constructed, and constructed with the aid of the land grant" (99 U.S. at 65), reaffirmed that Congress was "guarding against" the creation of "monopolies of public lands" when it enacted the settlement and preemption proviso to Section 3 of the Pacific Railroad Act. *Id.* at 64. In no decision has it ever been suggested that an interpretation of the Pacific Railroad Act which totally ignored the long-established Congressional aversion to monopolization of the land by the railroad was sustainable.

That the concern of Congress lest a railroad or its successors monopolize in perpetuity the land granted it was well founded is illustrated by the facts which form the backdrop to the Section 3 issue presented here. The Union Pacific and its subsidiaries continue to hold approximately one million acres of the land grant outright and, as of 1977, asserted claims to the subsurface on nearly another seven million acres—more than one third of the original land grant. The question posed by this case is whether the purported retention of subsurface rights is consistent with the

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[11] *Prescott* was later overruled with respect to the issue of state taxation of lands in *Railway Co.* v. *McShane, supra.* Nothing in *McShane* takes issue with *Prescott's* statement of Congress' intent that the Pacific Railroad Act not result in the creation of a railroad land monopoly.

commands of the settlement and preemption clause under which those lands came to the Railroad.[12]

The terms of that proviso are clear. The Union Pacific Railroad and its successors were given two choices:

> "While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or preemption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding $1.25 per acre, being payable to the company instead of the government." *Union Pacific R.R.* v. *McShane*, 24 F. Cas. 640, 643 (C.C.D. Neb.) (No. 14,382), *aff'd*, 89 U.S. 444 (1874).

Congress, while not compelling the railroad to sell the land, thus provided it with a clear financial incentive to do so by means of this two-pronged choice: selling within three years or running the risk of settlement and preemption thereafter. What Congress did not do was create a third option of selling the surface and retaining the subsurface, thus frustrating the workings of the proviso. Neither the preemption laws nor the Homesteading Act (the latter

[12] This Court's decision in *Leo Sheep*, *supra*, relied upon by the district court but not the Court of Appeals, in no way limits the interpretation of the proviso put forth by petitioners. The Court there refused to apply the common law doctrine of "easement by necessity" or an unfocused congressional intent to create an easement of access without reference in the Act. Here petitioners do not seek to advance any unrelated common law doctrine or to apply an abstract intent without reference to the specific statutory language. Instead petitioners seek to apply the language of the Act itself to serve the purposes of the very proviso at issue.

passed by the same Congress just months before the Pacific Railroad Act), provided for settlement or preemption of a subsurface estate, but only of an entire fee. *See Shaw* v. *Kellogg*, 170 U.S. 312 (1898). Were the Railroad's efforts to divide the land by sale into separate surface and subsurface estates sanctioned, and the frustration of settlement and homesteading during the period they were available thus confirmed, the Railroad finally would have completed its effort to circumvent the law, having acquired a permanent estate in the land grant without ever having exposed the land to the risk of settlement and preemption which Congress commanded under the settlement and preemption proviso.[13] The attempt to retain a subsurface estate by the Railroad is plainly invalid.

The Court of Appeals in this case recognized that where the land grant lands had not been sold or disposed of within three years "a settler seeking land under Section 3 might well be entitled to the entire fee." 696 F.2d at 92. (A. 7a-8a)[14] The court concluded, however, that the issue was

[13] Responding to a similar threat that action by a railroad would preclude ultimate compliance with the requirements of a land grant proviso by dividing mineral or timber from the surface interests, this Court affirmed an injunction against the Oregon & California Railroad precluding it from separating timber or minerals (coal and iron) from the rest of the property. It precluded sale of such timber or minerals " 'except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.' " *Oregon & California R.R.* v. *United States*, *supra*, 243 U.S. at 561.

[14] The Court of Appeals expressed doubt whether the railway or its successors would be obliged to sell the entire fee to entities other than settlers or preemptors claiming under those acts. 696 F.2d at 92. (A. 7a-8a) This dictum misses the point. Certainly petitioners do not claim to be homesteaders or preemptors, nor that their predecessors acquired the lands by settlement or preemption. But the invalidity of the purported reservation in no way turns on petitioners' status. The point is simply that if, as the Railroad now claims, it sold less than a fee interest to petitioners' predecessors, then the lands would not have been "sold" in

irrelevant because the lands at issue here *had been* "'sold or disposed of . . . within three years' of the railway's completion" (696 F.2d at 92) (A. 8a) when they were "sold upon foreclosure of the mortgages" placed on the lands by the Railway. *Id.*

The Court of Appeals cited no decision in support of its interpretation of the term "sold or disposed of." It recognized that *Platt* had held that no obligation to make railroad lands available for settlement or preemption existed so long as the mortgage remained in place, but also acknowledged that the Court in *Platt* had "specifically declined to consider 'whether the lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished.'" 696 F.2d at 92. (A. 8a)

But, as the Court of Appeals failed to note, the claim that the transfer of a railroad's interest in the land grant in mortgage foreclosure proceedings constituted a sale or disposition for purposes of satisfying a settlement and preemption proviso was hardly a new one. It had, in fact, previously been considered and rejected by this Court. In *United States* v. *Northern Pacific Ry., supra,* the Court was called upon to decide whether or not the Northern Pacific Railway "had failed to comply with the obligation" imposed by an 1870 Joint Resolution of Congress "pertaining to the disposition of the lands by settlement and preemption." 311 U.S. at 367. The Northern Pacific Railway had acquired its claim to the land grant lands in an 1896

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their entirety yet could never have been subject to settlement and preemption, since it was impossible to settle or preempt less than a fee estate. For this reason the purported reservations in the sales to petitioners' predecessors were inconsistent with and void under the settlement and preemption proviso and the Railroad, as a matter of law, necessarily conveyed its full fee interest when it sold its land grant lands.

mortgage foreclosure proceeding. This Court described the status of the entity before it in terms which, were the Union Pacific's name substituted, might well have been used to describe Union Pacific in this case:

> "The corporation chartered by Congress [the Northern Pacific Rail*road*] operated the road until receivers were appointed in 1893. Pursuant to foreclosure proceedings the Northern Pacific Rail*way* Company acquired title to the railroad, the land grant, and all other property of the original corporation and has since operated the road and obtained patents for millions of acres under the land grants." 311 U.S. at 328 (emphasis supplied).

The Northern Pacific Railway had argued, as the Union Pacific does here, that "the proviso does not apply to the Railway Company which purchased the lands at the foreclosure sale in 1896 . . . ." Brief for Appellees before the United States Supreme Court in *United States* v. *Northern Pacific Ry.* at 121; *see also id.* at 123. Notwithstanding this argument, this Court held the successor Northern Pacific entity was liable for violation of the settlement and preemption proviso. 311 U.S. at 368-69.[15]

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[15] The settlement and preemption proviso in *Northern Pacific* applied not only to lands "not sold or otherwise disposed of" within the prescribed time after completion of the railroad, but also to lands that "remain subject to the mortgage by this Act authorized." Based on this additional language, this Court in *Northern Pacific* concluded that Congress intended that settlement or preemption might proceed under the Northern Pacific Act even if a mortgage were in place. Seizing on the additional language in the Northern Pacific proviso, the Union Pacific urged below that this Court's decision in the context of a mortgage *foreclosure* in *Northern Pacific* was distinguishable here. The Union Pacific did not articulate why the words "sold" or "disposed of," identical in each statute, should be given inconsistent meanings; nor could it explain how the fact that settlement and preemption had been held to be "stayed" by a mortgage under

Nor is *Northern Pacific* the only decision of this Court to deal with the impact of mortgage foreclosure on the obligations of a railroad with respect to disposition of land grant lands. In the two *Oregon & California R.R.* decisions, the Court was called upon to interpret an 1869 proviso which limited sales to "actual settlers." *Oregon & California R.R.* v. *United States,* 238 U.S. 393 (1915) and 243 U.S. 549 (1917). In a suit by the United States challenging the railroad's failure to comply with the provision, it was urged by the successor railroad and various mortgagees that the sale upon foreclosure of the lands eliminated the obligations imposed by the proviso. This Court firmly rejected the contention. While recognizing that the proviso, like that at issue here, left the decision as to whether or not to sell at all in the railroad's hands, it noted the statutory limits on that discretion, concluding that the railroad

> "might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and *we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos.*" 238 U.S. at 434-35 (emphasis added).

See also 243 U.S. at 554-55.

The holding below is plainly inconsistent with these decisions. This Court should grant the petition to review the question of the validity of subsurface reservations under Section 3 of the Pacific Railroad Act.

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the Union Pacific Act in *Platt, supra,* and not stayed under the Northern Pacific Act, bore at all on the issue of whether the foreclosure of the mortgage and the resulting transfer of the lands to a successor railroad company satisfied the "sale" requirements of either act. The court below addressed none of these issues.

II.

The Repeated Refusal of the Tenth Circuit to Certify to the Wyoming Supreme Court a Concededly Undecided Question of Wyoming Real Property Law Notwithstanding the Opinion of the State of Wyoming That the Federal District Court's Prediction as to Wyoming Law, Relied Upon by the Court of Appeals, Would Likely Prove Erroneous, Offends Principles of Federalism and So Far Departs from the Accepted and Usual Course of Judicial Proceedings as to Warrant Review by This Court.

No issue is as fundamentally unique to American jurisprudence and none of late has been as much debated as the proper allocation of decision-making authority between the state and federal courts in a federal system.[16] The difficulties inherent in federal court adjudication of undecided questions of state law are, of course, well known. "Federal courts have no expertise in the application of state law and are particularly disadvantaged when a diversity suit requires the decision of a point not settled by the state

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[16] The subject has been central in the on-going debates concerning the abolition or limitation of federal diversity jurisdiction in which state and federal jurists, academicians and practitioners have been engaged. *See, e.g.*, Burger, *1982 Year End Report on the Judiciary* at 4-5; O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801, 811-14 (1981); Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Sheran and Issaacman, *State Cases Belong In State Courts*, 12 Creighton L.Rev. 1, 58-60 (1978); ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969); H. Friendly, *Federal Jurisdiction: A General View* 142-43 (1973), Haynesworth, Book Review, 87 Harv. L. Rev. 1082, 1089-90 (1974); D. Shapiro, *Federal Diversity Jurisdiction: A Survey and Proposal*, 91 Harv. L. Rev. 317 (1977). *Compare* Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317 (1967) *with* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 Texas L. Rev. 1 (1964).

courts." Bork, *supra*, 70 F.R.D. at 237; *see also* Burger, *supra* at 4-5; Haynesworth, *supra*, 87 Harv. L. Rev. at 1089; Friendly, *supra* at 99-100; *see also ALI, supra* at 100. The determination by a federal court sitting in a diversity case of an unsettled question of state law is at best a "tentative and indecisive judgment" which may be definitively contradicted by the state court of last resort when it considers the question. *Sutton* v. *Leib*, 342 U.S. 402, 413 (1952) (Frankfurter, J., concurring). *Cf. Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940).

In some cases, of course, "Erie guessing" is a necessary reality of diversity jurisdiction. But in Wyoming, as in twenty-three other states and Puerto Rico,[17] the procedural tool of certification by the federal court to the state supreme court exists to avoid these uncertainties and to minimize tensions in federal-state relations. This Court has en-

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[17] The following states (as well as Puerto Rico) have adopted the Uniform Certification of Questions of Law Act or some variant thereof: Alabama, Ala. R. App. P. 18, 2 Ala. Code, Ala. Const. Amend. 328 (1975); Colorado, Colo. App. R. 21.1; Florida, Fla. R. App. P. 9.150, Fla. Stat. Ann. § 25.031 (West 1974); Georgia, Ga. Sup. Ct. R. 36, Ga. Code Ann. § 15-2-9 (1982); Hawaii, Hawaii Rev. Stat. § 602-5 (Supp. 1981), Hawaii Sup. Ct. R. 20; Idaho, Idaho App. R. 12.1; Indiana, Ind. Code Ann. § 33-2-4-1 (Burns 1975), Ind. R. App. P. 15(O); Iowa, Iowa Code Ann. §§ 684A.1 to 684A.11 (West Supp. 1982-83); Kansas, Kan. Stat. Ann. §§ 60-3201 to 60-3212 (Supp. 1981); Kentucky, Ky. R. Civ. P. 76.37; Louisiana, La. Rev. Stat. Ann. § 13:72.1 (West Supp. 1982), La. Sup. Ct. R. 12; Maine, Me. Rev. Stat. Ann. tit. 4, § 57 (Supp. 1982-83), Me. R. Civ. P. 76B; Maryland, Md. Cts. & Jud. Proc. Code §§ 12-601 to 12-609 (1980); Massachusetts, Mass. Sup. Jud. Ct. Gen. R. 1:03; Minnesota, Minn. Stat. Ann. § 480.061 (West Supp. 1983); Montana, Mont. Sup. Ct. R. 1; New Hampshire, N.H. Appendix R. 21 to N.H. Rev. Stat. Ann. § 490 (1968); New Mexico, N.M. Stat. Ann. § 34-2-8 (1981); North Dakota, N.D. R. App. P. 47; Oklahoma, Okla. Stat. Ann. tit. 20, §§ 1601 to 1612 (West Supp. 1982-83); Puerto Rico, P.R. Sup. Ct. R. 27; Rhode Island, R.I. Sup. Ct. R. 6; Washington, Wash. Rev. Code Ann. §§ 2.60.010 to 2.60.900 (Supp. 1982); West Virginia, W. Va. Code §§ 51-1A-1 to 51-1A-12 (1981); Wyoming, Wyo. Stat. §§ 1-13-104 *et seq.* (1977), Wyo. R. App. P. 11.01 to 11.07.

thusiastically embraced the advent of state certification statutes such as the one adopted by Wyoming:

> "[The certification procedure] in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974) (footnote omitted).

So stating, this Court vacated the opinion below and remanded to the Second Circuit with directions to consider whether to certify a controlling issue of state law to the Florida Supreme Court. After the Florida Supreme Court answered the questions certified to it (313 So.2d 739 (Fla. 1975)), the Court of Appeals reversed its previous decision. *Schein* v. *Chasen*, 519 F.2d 453 (2d Cir. 1975) (*per curiam*). *See also Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Mills* v. *Rogers*, 102 S.Ct. 2442, 2452 (1982) (Court of Appeals' decision vacated to permit consideration of certification by First Circuit to Massachusetts Supreme Judicial Court); *Zant* v. *Stephens*, 102 S.Ct. 1856 (1982) (*per curiam*) (certification by this Court to Georgia Supreme Court). The availability of such a procedure has been greeted with enthusiasm by courts and commentators alike.[18]

While recourse to certification has been viewed as discretionary (*see Lehman Bros.* v. *Schein, supra*, 416 U.S. at 390-91), the circumstances of this case make plain that the refusal to certify warrants review in order that the

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[18] *See, e.g.*, Justice Frankfurter's reference in *Clay, supra*, to the enactment of the Florida certification statute as representing "rare foresight," 363 U.S. at 212; *see also Gates Rubber Co.* v. *USM Corp.*, 508 F.2d 603, 605 n.3 (7th Cir. 1975) (Stevens, J.) ("We regret that Illinois has not established a procedure, as has Indiana, which would enable us to obtain definitive answers to the questions of Illinois law from the tribunal with final authority to answer those questions.")

federal appellate courts may be given guidance in this sensitive area of state/federal relations.

In this case, the Tenth Circuit was asked by motion to certify to the Supreme Court of Wyoming under the Wyoming "Federal State Law Certificate Procedure Act," Wyo. Stat. §§ 1-13-104, *et seq.* (1977); and Wyo. R. App. P. 11.01 to 11.07 (A. 4s-7s) a question as to the meaning under Wyoming law of "coal and other minerals" in turn of the century deeds.[19] The Court of Appeals recognized that "no Wyoming state court has passed upon the issue" (696 F.2d at 93) (A. 10a) but added that

> "a Wyoming federal district court has previously determined that the phrase 'coal and other minerals' unambiguously encompasses oil and gas as a matter of Wyoming law. *Amoco Production Co.* v. *Guild Trust,* 461 F.Supp. 279, 283 (D.Wyo. 1978). We affirmed that holding in *Amoco Production Co.* v. *Guild Trust,* 636 F.2d 261 (10th Cir. 1980), *cert. denied,* 452 U.S. 967 (1981)." 696 F.2d at 93. (A. 10a)

The court did not analyze the merits of the underlying question and denied certification. Such a disposition ignores

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[19] The following question was proposed for certification:

"In deeds (contracted for in 1897 and 1899) otherwise conveying the fee interest in Wyoming lands, is the reservation of 'all coal and other minerals within or underlying said lands. . . .' effective as a matter of law unambiguously to reserve all oil, gas and associated liquid and gaseous hydrocarbons without regard to evidence as to the intent of the parties, drawn from, *inter alia,* the meaning of the words used at the time of deed execution, the interpretation placed on the deed language at the time of and after its execution, the relevant historical background or the parties' understanding of the statutes by which the land was granted to the grantor and pursuant to which the deed was given?" Brief of Defendants-Appellants in Support of their Motion for Certification to the Wyoming Supreme Court Pursuant to Wyo. Stat. § 1-13-106 at 6-7.

several points which suggest the extent of its rejection of core principles of our federal system. In the *Guild I* case relied upon by the Tenth Circuit (to which petitioners were not parties), the Court of Appeals had been asked to certify the very issue posed by the present case. As in this case, it declined without comment to certify the question and affirmed the lower court decision, although it explicitly acknowledged that Wyoming had not ruled on the issue. In fact, it acknowledged that other states had adopted a rule contrary to that adopted by the district court. 636 F.2d at 263-64. It explained its decision by reference to its view that the resident district court's opinion should be accorded "extraordinary force" when state law was unclear. *Id.* at 264.[20]

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[20] The Tenth Circuit's *Guild I* opinion did purport to survey the law as to the meaning of the phrase "minerals." It concluded that while Pennsylvania was of the view that "minerals" "does not include oil and gas" and Arkansas followed a somewhat similar rule, the majority rule and the rule "in the West" was that minerals included these substances. 636 F.2d at 263.

The mere fact of a recognized minority rule to the contrary itself suggests the seriousness of the undecided question, quite without regard to the views of the State of Wyoming discussed in text. Moreover, the suggestion of a common policy in the West is misleading. The court itself recognized that Oklahoma "follows the Pennsylvania rule." *Id.* at 263 n.2. And Utah, an adjoining state, had adopted a rule that views "minerals" as creating only a rebuttable presumption that oil and gas are included, rather than the absolute rule adopted by the Tenth Circuit for Wyoming. *See Western Development* v. *Nell*, 4 Utah 2d 112, 288 P.2d 452 (1955). *Cf. Radke* v. *Union Pacific R.R.*, 138 Colo. 189, 334 P.2d 1077 (1959) (where the Colorado Supreme Court considered the effect of an Union Pacific reservation of an "exclusive right to prospect for coal and other minerals" and held it ineffective on the ground that it was a mere license).

Discovery in the parallel Utah case suggests the strength of the evidence which would be available to petitioners if Wyoming adopted anything but the absolute rule adopted by the Tenth Circuit. That discovery has shown that when the Railroad meant to reserve "oil" the term was specifically included by hand in the early years and later in a preprinted form. And the word "oil" was, upon occasion, stricken from preprinted railroad forms—an

The court in *Guild I* did not even allude to the availability of certification. Nor did it deal with the expressed opinion of the State of Wyoming that the court's guess was, in fact, likely wrong. In the *Guild I* case the State of Wyoming sought leave to file a brief in support of the motion to abstain or certify. The brief of the State lodged with the court in support of that motion emphasized that the real property issue at stake would "affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens," (A. 19a) and that "[i]t would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders." *Id.* It stressed as well that a federal "forecast" of the eventual Wyoming decision would have no precedential effect and would leave the matter unresolved. (A. 20a) It noted the potentially "disruptive" effect of the "exercise of federal jurisdiction" on "the State's efforts to establish a coherent, uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas." (A. 19a-20a) The significance of these concerns was emphasized by the view on the merits expressed by the State:

> "It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court of the State of Wyoming would likely differ from the decision of the District Court below in this case." (A. 23a)

The Tenth Circuit in *Guild I* denied leave even to file that brief and in this case did not refer to the views of the State of Wyoming.

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act hardly consistent with a view that reservations of "coal and other minerals" and "oil, coal and other minerals" were of identical meaning. It is material of this nature which the Tenth Circuit's ruling wholly excludes.

Nor did the Court of Appeals note in this case the consistent efforts of the Union Pacific and the other respondents to block state court adjudication of the meaning of the reservations. This effort has led respondents not only to oppose certification in this case, but to remove three cases commenced in the Wyoming state courts.[21] In addition, certification was sought and denied in the removed cases and the two *Guild* cases. These circumstances, taken together, make apparent the threat to federal-state relations from so clear a circumvention of the Wyoming courts and so disdainful a rejection of views of the State itself as to land within its borders.

Quite apart from principles of federalism, principles of judicial economy also supported certification here. One of the problems inherent in federal adjudication of unresolved issues of state law is that such decisions provide no definitive guidance for the future (*see* Sheran and Isaacman, *supra* n.16 at 58); this makes certification particularly ap-

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[21] *Thousand Peaks Ranches, Inc.* v. *Union Pacific Land Resources Corp.*, No. C-79-091K (D.Wyo.) (appeal pending); *Thousand Peaks Ranches, Inc.* v. *Union Pacific Corp.*, No. C-79-188K (D.Wyo.) (appeal pending); *Guild Trust* v. *Union Pacific Land Resources Corp.*, 682 F.2d 208 (10th Cir. 1982) (*"Guild II"*). The last of these cases, one involving essentially the same parties as those involved in the earlier *Guild I* case relied upon by the Tenth Circuit, may serve as a paradigm of the risks to federalism inherent in that court's treatment of Wyoming land law issues in this and other cases. That case was commenced in the state courts in Uinta County, Wyoming. It was removed to the federal courts by Union Pacific and Amoco. It was decided in substantial part in reliance upon the earlier *Guild I* ruling decided by the same federal district judge. On appeal the Tenth Circuit refused to certify the Wyoming law question, although it recognized that the question of Wyoming law had not been passed upon by the courts of that State and that "[r]eal property doctrines are matters for the determination of the state where the land is located." 682 F.2d at 212. The Court did not refer to the brief *amicus curiae* of Wyoming proffered in that case, as in the earlier one, urging that the Wyoming courts be permitted to make just that "determination."

propriate in cases when the same issue is likely to recur in other cases in the federal courts. Three other cases now in the federal courts involve the very issue of Wyoming law posed here.[22] Thousands of Wyoming citizens and landowners will also be affected by an ultimately dispositive decision. *See* Brief Amicus Curiae of the State of Wyoming at A. 19a.

This Court has taken pains to permit state courts to decide significant issues of state land law, even in the absence of so convenient a procedure as certification. In remitting a cause concerning oil rights to an Illinois state plenary action rather than a federal bankruptcy proceeding the Court stated:

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme." *Thompson* v. *Magnolia Petroleum Co., supra,* 309 U.S. at 484 (footnote omitted).

See also Leiter Minerals, Inc. v. *United States,* 352 U.S. 220 (1957) (where this Court modified a judgment of the Court of Appeals to permit the parties to seek declaratory judgment in the Louisiana state courts with respect to aspects of a dispute over mineral rights); *Kaiser Steel Corp.* v. *W.S. Ranch Co.,* 391 U.S. 593 (1968) (*per curiam*) (authorizing abstention in a dispute over water rights).

Here the far less drastic certification procedure is available. The Wyoming Supreme Court is currently "the most

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[22] These cases are the two *Thousand Peaks* cases cited in n.21, *supra,* and *Anschutz Land and Livestock Co.* v. *Union Pacific R.R.,* No. C-77-0390(J) (D.Utah).

up-to-date state supreme court in the nation" (State of Wyoming, *1983-84 Biennium Request* at 3). Thus a speedy adjudication of any certified question could be expected.[23]

As Justice Frankfurter lamented, federal courts sometimes must embark upon "the ascertainment" and, as appears to have occurred here, "the formulation" of state law in matters of grave concern to the state. *See Sutton* v. *Leib, supra,* 342 U.S. at 413 (Frankfurter, J., concurring). But it is not always necessary to undertake so perilous a venture. This is a case in point. State procedures exist to obtain a definitive ruling as to the proper interpretation of Wyoming real property law. In failing to avail itself of these procedures, in failing even to explain its refusal to do so in the face of the expressed views of the State itself as to the importance of the matter and its likely disposition in the Wyoming Supreme Court, the Court of Appeals ignored basic values of our federal system. This Court should grant the petition in order to permit the Court of Appeals to certify the question or, in the alternative, to permit this Court itself to do so, as permitted by the Wyoming certification statute.

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[23] The Wyoming Supreme Court has also made clear that even were a certified matter viewed as an "interlocutory" question "not in connection with a final disposition of the case" this would pose no bar to its receiving and deciding the certified question from the federal courts. *Rhodes* v. *Bush,* No. 5640 (Wyo. 1982) (Raper, J., concurring). The receptiveness of that court to certification in general has been reflected most recently in *Wyoming State Dept. of Ed.* v. *Barber,* 649 P.2d 681, 691 (1982) (Rooney, J. concurring).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1966

December 14, 1982

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Plaintiffs-Appellees,

v.

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. C79-157K)

Before:

SETH, SEYMOUR, and COOK.*

SEYMOUR, Circuit Judge.

This diversity action involves title to oil and gas interests in lands situated in western Wyoming. Union Pacific Land

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*Honorable H. Dale Cook, Chief District Judge for the Northern District of Oklahoma, sitting by designation.

Resources Corporation (Union), Champlin Petroleum Company (Champlin), and Amoco Production Company (Amoco) brought this quiet title suit in the Wyoming District Court against Moench Investment Company (Moench) and Thousand Peaks Ranches, Inc. (Thousand Peaks), the holders of the surface estate to the lands in question. The district court granted summary judgment in favor of plaintiffs, and Moench and Thousand Peaks (hereinafter referred to collectively as Moench) appeal. Moench contends that summary judgment was inappropriate because facts crucial to the interpretation of documents determinative of the oil and gas ownership issue remain controverted. We disagree.

I.

Historical Background

The lands involved in this case, five sections or part-sections of land located in Uinta County, Wyoming, were originally granted to a corporate predecessor of the Union Pacific Railroad Company pursuant to the Union Pacific Act of 1862, ch. 120, 12 Stat. 489, *amended by* Act of July 2, 1864, ch. 216, 13 Stat. 356. Section 3 of the Act granted odd-numbered sections of public land to the Railroad for every mile of track laid "for the purpose of aiding in the construction" of a transcontinental railway.[1] The Union

[1] Section 3 provides:

"*And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles

Pacific Act of 1862, ch. 120, § 3, 12 Stat. 489, 492, *amended by* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358. The grant excluded "all mineral lands" from the conveyance. Union Pacific Act § 3. Section 4 of the Act provided that patents to the lands conveyed by section 3 would be issued to the Railroad upon completion of forty consecutive miles of railway. *Id.* § 4.

The lands here at issue were originally granted to "The Union Pacific Railroad Company" (The Union Pacific) by the Union Pacific Act. In the years immediately following the Act's passage and amendment, The Union Pacific was unable to raise adequate financing for construction of the railway. Therefore, in 1867 the company mortgaged its entire land grant including the lands in controversy. A second mortgage of the entire grant was executed in 1873. In 1880, The Union Pacific was consolidated with two other land-grant railroad corporations to form "The Union Pacific Railway Company" (the Railway), which succeeded to The Union Pacific's interests. *See United States* v. *Union Pacific Railway*, 148 U.S. 562, 566-67 (1893). In 1893, the Railway went into receivership. The mortgage was fore-

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on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed; *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

Union Pacific Act of 1862, ch. 120, § 3, 12 Stat. 489, 492, *amended by* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358.

closed in 1898, Final Decree of Foreclosure, *Union Trust Co.* v. *The Union Pacific Railway* (No. 252, D. Utah 1898) (cited in Rec., vol. I, at 324), and the land-grant lands and interests therein still owned by the Railway were sold to the "Union Pacific Railroad Company" (the Railroad) in 1899, Rec., vol. VII, Ex. 1-C (Special Master's deed). The Railroad obtained patents to these lands in 1901. The Railroad later sold the real estate to the Rigby Ranch Company retaining "all coal and other minerals" for itself, its successors, and its assigns. Moench acquired the Rigby Ranch Company interests between 1936 and 1939, and Union obtained the Railroad interests in 1971. In 1977, Union conveyed its petroleum rights in the lands to Champlin, which subsequently leased the same to Amoco.

II.

Procedural History

Union, Champlin, and Amoco (hereinafter referred to collectively as Union) brought an action to quiet title to the petroleum rights in these Wyoming lands in June 1979. The lawsuit was apparently a reaction to litigation previously commenced by Moench and others contesting Union's title to oil and gas under identical mineral reservations in deeds to other land grant property in Utah and Wyoming.

Moench responded to the quiet title action by: (1) denying that Union owned any minerals in the Wyoming real estate; (2) contending that the Union Pacific Act required the original grantee and its successors to sell or forfeit all interests in the land grant acreage; and (3) claiming that the Railroad's retention of "all coal and other minerals" was ambiguous and should be interpreted to exclude oil and gas.

The district court entered summary judgment for Union in August 1980. *Union Pacific Land Resources Corp.* v. *Moench Investment Co.*, 495 F. Supp. 876 (D. Wyo. 1980). The court recited the previously outlined chains of title, determined that the mineral reservation included oil and gas rights as a matter of state law, and rejected Moench's Union Pacific Act claims. *Id.* at 877-78.

Moench now contests on two independent bases the propriety of entering summary judgment. It primarily asserts that facts prerequisite to a correct construction of Pacific Railroad Act land grant conditions remain in dispute. Moench suggests this alleged factual controversy precludes any summary determination as to the extent of Union's oil and gas ownership in the Wyoming properties. Moench additionally charges that the Railroad's deed reservation of "all coal and other minerals" is ambiguous and argues that parol evidence establishes that the clause excludes petroleum products.

III.

Analysis

A. Pacific Railroad Act Issue

Moench's first argument focuses on the Act's "settlement and preemption" proviso. Congress granted the section 3 lands to The Union Pacific to enable it to finance its construction costs by land sales. However, Congress did not wish the lands to be entirely foreclosed to settlers in the country's nineteenth century westward expansion. Thus, Congress provided that

> "[A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three

> years after the entire [transcontinental railway] shall have been completed, shall be subject to settlement and preemption, like other lands. . . ."

Union Pacific Act § 3.

Moench maintains that factual disputes exist concerning the meaning of this condition and the compliance or non-compliance with its requirements, which render summary judgment improper. Moench claims that the facts surrounding the insertion of the proviso into the Union Pacific Act suggest a governmental intention to prevent The Union Pacific (and thus its successors in interest) from obtaining any surface or mineral interest in the granted lands beyond that immediately necessary for the construction of the railway. Moench additionally argues that the Wyoming property was never "sold or disposed of" as required by the settlement and preemption proviso, and that public policy therefore demands that the Railroad's successor, Union, now divest itself of all interest in the real estate.

Moench's theory essentially must be that the terms of section 3 precluded the Railroad from retaining an interest in the mineral estate while selling the surface estate to Moench's predecessor in interest. The section does state that "all mineral lands" are excepted from the Act's land grants. *See United States* v. *Union Pacific Railroad*, 353 U.S. 112, 114-17 (1957). However, the Supreme Court has held repeatedly that this exception refers to the determination at time of patenting of the lands' mineral or non-mineral character. *See, e.g., id.* at 116; *Burke* v. *Southern Pacific Railroad*, 234 U.S. 669, 683-85, 698-705 (1914); *Shaw* v. *Kellogg*, 170 U.S. 312, 339 (1898); *Davis* v. *Wiebbold*, 139 U.S. 507, 519 (1891). The issuance of a patent after an administrative determination that the lands were not

mineral in character was held to constitute a final administrative decision that is conclusive on the issue against collateral attack. *Burke*, 234 U.S. at 691-92, 710; *see also Davis* v. *Wiebbold*, 139 U.S. at 526-27, 529-30 (Land Department patents conclusive when assailed collaterally); *Deffeback* v. *Hawkes*, 115 U.S. 392, 404-05 (1885) (lands for which a patent has been issued under a grant excepting mineral lands are proof against a later discovery of minerals).[3] The lands at issue were patented to the Railroad in 1901. The mineral lands exclusion therefore does not restrain grantees' ability to reserve mineral interests in sales of section 3 lands.

Neither do we find Moench's "settlement and preemption" clause argument persuasive. The language of the clause in no way suggests that the grantee received only a limited fee barren of rights to whatever minerals might later be discovered. Nor does the language suggest that the grantee was required to convey its entire fee to a purchaser. Moench points to no legislative history that supports its interpretation of the clause. At most the clause requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights to lands neither sold nor disposed of within three years of completion of the railway. In such a situation, a settler seeking land under section 3

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[3] The patents to the lands at issue here contain the phrase "the United States . . . Do Give and Grant unto the said 'Union Pacific Railroad Company' and to its assigns the tracts of land listed [in the patent]: Yet excluding and excepting from the transfer by these presents 'All Mineral Lands' should any such be found to exist in the tracts." Rec., vol. VII, Exhibits I-A, -B. In *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914), the Supreme Court held that this clause, contained in all patents issued from 1866 to 1904 under railroad land grants containing mineral lands exclusions, was invalid. *Id.* at 693-95, 705, 710-11.

might well be entitled to the entire fee. However, we need not address this question, for in this case the lands at issue *were* "sold or disposed of . . . within three years" of the railway's completion.

In 1879, the Supreme Court examined the effect of the land-grant mortgages relative to section 3's "sale or disposal" clause. In *Platt* v. *Union Pacific Railroad*, 99 U.S. 48 (1879), would-be preemptors challenged the mortgage transactions as not being sales or disposals as required by section 3. The Court dismissed the claim that this financing maneuver was violative of congressional intent that the company not acquire a monopolistic holding of the public lands, *id.* at 64-65, stating that "we have been led unhesitatingly to the conclusion that the deed of trust or mortgage executed . . . in 1867 was a disposition of the lands granted by the 3d section of the Act of 1862, within the meaning of that Act," *id.* at 64.[3]

In *Platt*, the Court specifically declined to consider "whether the lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished." *Id.* We too need not consider the question, because the lands were in fact sold upon foreclosure of the mortgages. The lands were not then

[3] Moench argues that we should discount *Platt's* holding because it was a "collusive" lawsuit, brought by one of the Union Pacific's own attorneys, William H. Platt, and completely funded by the railroad. Brief of Appellant, at 10. Although this contention is intriguing, we note that the case was argued before the Court by the Attorney General of the United States as intervenor in opposition to The Union Pacific, *see Platt* v. *The Union Pac. R.R.*, 99 U.S. 48, 48 (1879) (reporter's syllabus). Additionally, the Court fully considered and discussed the "sale or disposal" issue. Because *Platt* has never been overturned, it remains determinative on this point.

and are not now subject to the settlement and preemption clause.[4]

The Union Pacific received an unqualified fee interest in the lands involved in this case and subsequently "sold or disposed of" them as required by the statute. We hold that the Railroad's sale of the surface estate to the Rigby Ranch Company, reserving "coal and other minerals" to the Railroad, did not violate the Union Pacific Act.[5]

B. Deed Reservation Claims

Moench erroneously argues that summary judgment is improper because of factual disputes over the scope of the

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[4] This quiet title suit resolves only the relative rights of the parties involved. From the record before us, it appears evident that if any doubt remains about the nature of the interest granted to The Union Pacific, the only party who could raise that question would be the original grantor, the United States. *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914), a case brought by a person claiming mineral rights in lands patented to the railroad, held that the government's issuance of a patent vested title to petroleum deposits located in the lands conveyed. *Id.* at 710-11. The railroad's title was subject to the government's right to attack the patent by a direct suit for annulment if the land was known to be mineral when the patent was issued. *Id.* The government does not appear in this case.

Likewise, the only other cloud on appellees' interests here, the mineral lands exception contained in the original federal patents, *see* note 2 *supra*, would lie in favor of the government. The government does not appear to contest the Supreme Court's holding in *Burke*, 234 U.S. at 710, that such exception is void and of no effect.

[5] We also reject Moench's argument that a factual dispute involving the meaning of or adherence to the "sale or disposal" condition precludes summary judgment in this case. Questions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment. *Standard Oil* v. *Department of Energy*, 596 F.2d 1029, 1066 (Temp. Em. Ct. of App. 1978); *Mobil Oil Corp.* v. *Federal Energy Admin.*, 566 F.2d 87, 92 (Temp. Em. Ct. of App. 1977).

Railroad's reservation of "coal and other minerals" in its conveyances to Moench's predecessor. Wyoming substantive law governs this diversity case. Although no Wyoming state court has passed upon the issue, a Wyoming federal district court has previously determined that the phrase "coal and other minerals" unambiguously encompasses oil and gas as a matter of Wyoming law. *Amoco Production Co.* v. *Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978). We affirmed that holding in *Amoco Production Co.* v. *Guild Trust*, 636 F.2d 261 (10th Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). Because the phrase is unambiguous, there is no need to resort to the supplementary materials that Moench contends are necessary to determine the plain meaning of the reservation. *See Shepard* v. *Top Hat Land & Cattle Co.*, 560 P.2d 730, 732 (Wyo. 1977).

Moench also makes numerous allegations of deceptive and inconsistent practices on the part of the Railroad in its sales of section 3 lands. However, Moench does not allege that its predecessor, the Rigby Ranch, was in fact defrauded or misled in any way in its purchase of the lands at issue. Consequently, although Moench's contentions make interesting reading, they provide no basis for remanding for further consideration in examining the transaction at issue.

We have reviewed Moench's remaining arguments and find them unpersuasive.

AFFIRMED.

Order of the United States District Court for the District of Wyoming Sustaining Motion for Summary Judgment and Summary Judgment

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UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Plaintiffs,

v.

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Defendants.

No. C79-157K

United States District Court,
D. Wyoming

Aug. 15, 1980

ORDER SUSTAINING MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT

KERR, District Judge.

The above-entitled matter coming on regularly for hearing before the Court upon plaintiffs' Motion for Summary Judgment, and the Court having heard the arguments of counsel in support of said Motion and in opposition thereto, and the Court having taken said matter under advisement and having fully and carefully considered the pleadings, exhibits, affidavits and memorandum briefs filed on behalf

of the parties, and all matters relevant thereto, and being fully advised in the premises; FINDS

1. Plaintiffs and defendants are citizens of different states, and the amount in controversy exceeds $10,000 exclusive of interest and costs.

2. The Court has jurisdiction of this controversy pursuant to 28 U.S.C. 1332(a).

3. This is an action to quiet title to minerals in certain sections and part-sections of land in Uinta County, Wyoming. The legal description of the lands in question is as follows:

Township 12 North, Range 120 West of the 6th P.M.
Section 19: All
Township 12 North, Range 121 West of the 6th P.M.
Section 1: All
Section 3: Lots 1, 2, 3
Section 11: All but the SW-¼-SW¼
Section 13: All

4. The lands, including all minerals and mineral rights therein, were granted in fee to the Union Pacific Railroad Company, a federally-chartered corporation, its successors and assigns, by and under the Pacific Railway Act of 1862, 12 Stat. 489, as amended in 13 Stat. 356 (1864), (the Union Pacific Act).

5. These lands were conveyed by the United States of America to Union Pacific Railroad Company, a Utah corporation, as a successor in interest to the original grantee, by Patents No. 63 and 65, dated May 28, 1901.

6. By Warranty Deeds dated March 12, 1908 and December 7, 1909, Union Pacific Railroad Company conveyed

the lands to Rigby Ranch Company, subject to a reservation to the Union Pacific Railroad Company, its successors and assigns, of "all coal and other minerals within or underlying said lands." The language of the mineral reservations is identical to the language of the reservation construed by this Court in *Amoco Production Company* v. *Guild Trust*, 461 F.Supp. 279 (Wyo.1978).

7. Plaintiffs are collectively the successors to the mineral estate reserved by Union Pacific Railroad Company in its conveyances to Rigby Ranch Company.

8. Defendants are successors in interest to Rigby Ranch Company and are owners of record of the lands, subject to the aforesaid mineral reservations in favor of Union Pacific Railroad Company.

9. By Quitclaim Deed dated April 1, 1971, the reserved mineral estates were conveyed by Union Pacific Railroad Company to Union Pacific Land Resources Corporation. This corporation then executed a Mineral Deed of the oil and gas rights, dated December 10, 1976, to Champlin Petroleum Company. Champlin then granted an Oil and Gas Lease to Amoco Production Company, dated January 12, 1977, of oil and gas rights in certain of the subject lands.

10. There is no genuine issue as to any material fact and the case is ripe for Summary Judgment.

11. The reservations of "all coal and other minerals" in the deeds to the lands are lawful and valid reservations of minerals according to their terms, and are in no way contrary to or inconsistent with the Union Pacific Act. *Burke* v. *Southern Pacific Railroad Co.*, 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527 (1914); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979).

12. The reservations of "all coal and other minerals" in the deeds to the lands unambiguously sever the mineral estate and reserve to Union Pacific Railroad Company, its successors and assigns, all right, title and interest in the entire mineral estate, including all oil, gas and associated liquid and gaseous hydrocarbons in and under the subject lands and attendant rights of surface access. *Amoco Production Company* v. *Guild Trust*, supra.

13. Plaintiffs are therefore entitled to a judgment quieting their title to the entire mineral estate, including all oil, gas and associated liquid and gaseous hydrocarbons in and underlying the subject lands, and plaintiffs are entitled to a permanent injunction enjoining defendants, their agents, servants, employees and any persons acting in concert or participation with them who receive actual notice of this Court's order from interfering or attempting to interfere with the exercise by plaintiffs of the mineral rights confirmed by the judgment.

Now, Therefore, It Is Ordered that the Motion for Summary Judgment be and the same is hereby granted in favor of the plaintiffs and against the defendants, quieting title to the aforesaid described premises; it is

Further Ordered that each party pay its own costs.

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in *Amoco Production Co.* v. *Guild Trust*

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1236

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; and UNION PACIFIC LAND RESOURCES CORPORATION, a corporation,

Appellees,

—vs—

GUILD TRUST: MELBA L. GUILD: DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FRED CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,

Appellants.

No. 79-1568

GUILD TRUST, et al.,

Appellants,

—vs—

UNION PACIFIC LAND RESOURCES CORPORATION, et al.,

Appellees.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

In accordance with Rule 29, Federal Rules of Appellate Procedure, the Applicant State of Wyoming hereby moves

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in Guild I

for leave to file an Amicus Curiae brief respectfully requesting that the Tenth Circuit Court of Appeals abstain from determination of the above-entitled action pending resolution of the legal issues involved by a State of Wyoming District Court or the Supreme Court of the State of Wyoming. In the alternative, the Applicant State of Wyoming respectfully requests that the Court issue a stay of proceedings Order and certify the questions of state law to the Supreme Court of the State of Wyoming, in accordance with Rule 11, Wyoming Rules of Appellate Procedure. A copy of that Rule is attached to this motion, marked Exhibit A.[*]

The State of Wyoming is owner of lands in Wyoming containing similar mineral reservations as are involved in the above-entitled case and is presently considering the advisability of initiating litigation concerning the ownership of liquid hydrocarbons and other minerals contained in the mineral estates of such property. The State of Wyoming believes that the legal issues involved are questions of substantive state law, as defined by *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and as yet undetermined by the Supreme Court of Wyoming. As the resolution of such issues would significantly and directly affect State property and the rights and liabilities of numerous citizens of the State of Wyoming, the Applicant respectfully submits that the issues are ones better determined by the courts of the State of Wyoming and, therefore, requests the opportunity to present argument in this Court on the matter.

[* Exhibit A omitted in printing. See Wyoming Rules of Appellate Procedure Rule 11, set forth in the Statutory Appendix at p. 6a.]

Motion of the State of Wyoming for Leave to File Brief Amicus Curiae in Guild I

Therefore, the Applicant State of Wyoming respectfully moves this Court for leave to file an Amicus Curiae Brief presenting argument to the Court in the above-entitled matter.

Respectfully submitted,

/s/ Peter J. Mulvaney
Deputy Attorney General for The Attorney General of the State of Wyoming

/s/ Richard Scott Rideout
Assistant Attorney General

/s/ Mary Bell Guthrie
Assistant Attorney General

Amicus Brief of the State of Wyoming in Support of Appellant's Motion for Abstention or, in the Alternative, Certification in *Amoco Production Co.* v. *Guild Trust*

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 79-1236

AMOCO PRODUCTION COMPANY, a corporation; CHAMPLIN PETROLEUM COMPANY, a corporation; and UNION PACIFIC LAND RESOURCES CORPORATION, a corporation,

Appellees,

—VS—

GUILD TRUST: MELBA L. GUILD: DELMAR D. DEAN and MARY MELBA GUILD DEAN, husband and wife; EARL GUILD and BARBARA JO GUILD, husband and wife; FRED CHRISTIANSEN and EVA LOIS CHRISTIANSEN, husband and wife,

Appellants.

No. 79-1568

GUILD TRUST, et al.,

Appellants,

—VS—

UNION PACIFIC LAND RESOURCES CORPORATION, et al.,

Appellees.

AMICUS BRIEF OF THE STATE OF WYOMING IN SUPPORT OF APPELLANT'S MOTION FOR ABSTENTION

Amicus Brief of the State of Wyoming in Guild I

I

Motion for Stay of Proceedings and Abstention

It is the position of the State of Wyoming that the Federal Tenth Circuit Court of Appeals should stay and abstain from decision in the above-entitled appeal pending resolution and determination of existing State litigation involving identical issues. In this regard, the State of Wyoming adopts the Brief of Appellants, entitled "Memorandum in Support of Appellant's Motion to Stay and Motion for Abstention and Alternative Motion for Certification" and the arguments and legal authority offered therein. The purpose of the State's brief is not to repeat those arguments, but to attempt to impress upon the Court of Appeals the vital character of the litigation and issues and how those issues affect the State of Wyoming and its citizens. It is the position of the State of Wyoming that analysis of the circumstances and factors presented in this case justify abstention.

A.

This Case Bears on Policy Problems of Substantial Public Import.

Resolution of the issues presented in this case will directly affect title to the mineral estate of lands owned by the State of Wyoming and thousands of its citizens. It would be difficult to conceive of an issue that has greater bearing or interest to the State of Wyoming than the ownership of real property within its borders. Clearly, the issue presents a substantial question of public policy and concern and the exercise of federal jurisdiction could be disruptive of the State's efforts to establish a coherent,

uniform policy and method of even handed, intelligent regulation of ownership of vital resources such as oil and gas. As noted in Appellant's memorandum, conservation and revenue production are major concerns to the State. The question is basic: ownership of Wyoming real property. The State respectfully submits that resolution of so fundamental a question should only be made by a Wyoming Court after full opportunity for development of the facts and law.

B.

The Issues Will Eventually Have To Be Resolved by the Wyoming Judiciary.

Under the *Erie Doctrine, Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), in diversity cases, questions of substantive law are to be determined by the law of the State where the federal court is located. In the absence of such a determination, the federal courts may, of course, decide the issue, based on what they *believe* to be the State law. Such a forecast can not, however, bind the State judiciary and the decision is not of controlling precedential value. Such a determination will only affect the immediate parties to the action and will not establish a general proposition of law of statewide application as would a decision of the highest court of a State. In the case before the Court, no general, uniform rule of law will result from this litigation if decided by the United States Tenth Circuit Court of Appeals and the State of Wyoming and its citizens will be denied the benefit of stability, uniformity and certainty in an area of law that directly, substantially and vitally affects their lives and fortunes. Unless and until the issues are resolved by the Wyoming Judiciary, such uncertainty will remain to plague real

property transactions in the State. The State respectfully submits that this court should not aid or further such a result.

C.

The Issues Are Novel and Unique in Wyoming.

The State represents to this Court that it is unaware of any Wyoming Supreme Court Decision that is determinative of the issues presented before this Court. Such a case, however, is now pending before a district court in Wyoming on an action for declaratory judgment. Resolution of that case will settle the issues before this Court. Further discussion of this point is set forth in Section *D.*, below.

D.

Resolution of the Issues by the Wyoming Court Is Imminent.

As noted in the brief of Appellant, Appellants' Memorandum In Support of Motion to Stay and for Abstention, p.14, one of the factors noted by the United States Supreme Court in the *Kaiser Steel Co.* v. *W.S. Ranch Co.,* 391 U.S. 593 (1968), case as bearing on the decision whether a federal court should abstain from decision of an issue in the presence of litigation in a state court concerning the same or similar issues. In *Kaiser Steel,* the Supreme Court found the fact that the litigation was for a declaratory judgment was sufficient to assure reasonably speedy state court resolution of the questions. The State of Wyoming represents to this court that such is the situation here.

On September 24, 1979, the State of Wyoming, as plaintiff, filed a Declaratory Judgment action to quiet title to a

mineral estate in land owned by the State as a subsequent grantee. The Union Pacific Railway Company was the grantor under the original deed. That original deed, from the Union Pacific Railway Company to the State's predecessor in title, A.C. Beckwith, contained the following reservation:

> "RESERVING, HOWEVER, to the said Union Pacific Railway Company the exclusive right to prospect for caol (sic) and other minerals within and underlying said lands and space necessary for the conduct of said business thereon, without change or liability for damage therefore."

This action was filed in the district court, Unita County, Wyoming, Third Judicial District, State of Wyoming, Civil No. 69-1372. A copy of the complaint is attached to this brief, marked "Exhibit A." [*] The action was brought under the Wyoming Declaratory Judgments Act, § 1-37-101, et seq., W.S. 1977, to quiet title to the mineral estate. It appears clear in Wyoming that such a procedure is proper. *Ohio Oil Co.* v. *The Wyoming Agency, Inc.*, 63 Wyo. 187, 179 P.2d 773 (1947). In addition, this act, and Rule 57, Wyoming Rules of Civil Procedure (identical for this purpose with Rule 57, Federal Rules of Civil Procedure), allows a "speedy hearing of an action for a declaratory judgment . . . ," and advancement on the court calendar. C.f., Wright and Miller, Federal Practice and Procedure, Civil: § 2768; Moore's Federal Practise, Vol. 6A, ¶ 57.29. It is the avowed intention of the State of Wyoming to pursue this matter to judgment with all deliberate speed, thus satisfying another factor that should induce this court to abstain from decision in this case.

[* Exhibits omitted in printing.]

E.

There Is Strong Likelihood That the Wyoming Court Will Rule Differently on the Dispositive Issues in This Case.

The State adopts the Appellant's arguments as set out in his memorandum, at p. 14, and commends the Court to consider the thoughtful analysis offered there. It is the opinion of the State that if given an opportunity to decide such questions, the Supreme Court of the State of Wyoming would likely differ from the decision of the District Court below in this case.

CONCLUSION

As the United States Supreme Court noted in *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 324 (1942), it is not unusual for the Attorney General of a State to become involved with litigation that cannot be categorized as a "mere isolated dispute between private parties." When issues are of vital, general concern to the public, it is only natural and appropriate that the State's highest law official should become involved to protect those interests. The Attorney General of the State of Wyoming believes the case before the court presents such a situation and respectfully requests that the United States Tenth Circuit Court of Appeals abstain from decision until the pending litigation in the State of Wyoming is resolved. A review of that State court action will reveal that the parties defendant are virtually identical to the Appellees here; the legal issues, factual allegations are virtually identical; the relief prayed for is similar; and,

the same central issue is presented by both cases. In this situation, abstention is proper.

October 11, 1979

Respectfully submitted,

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Upland Industries Corporation Summary of Land Grant Lands by Type of Mineral Reservations as of December 31, 1977 and Interpretive Code

Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
101	183,975.98	1,200.01	.00	600.00	.00	185,775.99
102	.00	80.00	.00	.00	.00	80.00
103	80.00	.00	.00	.00	.00	80.00
104	320.00	.00	.00	.00	.00	320.00
105	.00	.00	.00	.00	.00	.00
106	38,023.79	.00	.00	.00	.00	38,023.79
107	320.00	.00	.00	.00	.00	320.00
108	.00	320.00	.00	.00	.00	320.00
109	.00	.00	.00	.00	13.92	13.92
201	.00	.00	.00	60,067.01	49,164.27	109,231.28
202	.00	.00	.00	369.20	.00	369.20
203	122.36	.00	.00	120.00	29,397.93	29,640.29
204	.00	.00	.00	.00	20,469.16	20,469.16
205	400.00	.00	.00	.00	14,592.63	14,992.63
206	.00	.00	.00	920.00	52,615.23	53,535.23
207	.00	.00	.00	.00	1,797.57	1,797.57
208	.00	.00	.00	.00	640.00	640.00
209	3,124.02	.00	.00	.00	.00	3,124.02
210	.00	.00	.00	.00	205.00	205.00

Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
211	400.00	.00	.00	.00	640.00	1,040.00
301	42,408.23	.00	.00	.00	640.00	43,048.23
302	.00	.00	.00	.00	.00	.00
303	.00	.00	.00	.00	220.00	220.00
401	636,856.50	1,119.77	94.61	416,484.97	757,051.71	1,811,607.56
402	.00	.00	.00	00	45,307.00	45,307.00
403	.00	.00	.00	.00	26,408.35	26,408.35
404	1,280.00	.00	.00	.00	.00	1,280.00
405	478.89	.00	.00	.00	80.24	559.13
406	640.00	.00	.00	5,386.56	31,808.78	37,835.34
407	.00	.00	.00	440.00	.00	440.00
408	.00	.00	.00	1,600.26	.00	1,600.26
409	.00	.00	.00	.00	77,505.48	77,505.48
410	.00	.00	.00	8,261.14	.00	8,261.14
411	.00	.00	.00	1,109.90	.00	1,109.90
412	.00	.00	.00	18,238.79	.00	18,238.79
413	.00	.00	.00	3,089.89	.00	3,089.89
414	.00	.00	.00	.00	178,665.03	178,665.03
415	190.00	.00	.00	.00	.00	190.00
501	1,844,391.09	2,327.60	18,760.78	141,930.26	2,068,487.33	4,075,897.06
502	.00	.00	.00	.00	33,899.42	33,899.42
503	.00	.00	.00	.00	13,080.27	13,080.27

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Mineral Type	Colorado Acres	Kansas Acres	Nebraska Acres	Utah Acres	Wyoming Acres	Total Acres
504	631.08	.00	.00	2,482.56	5,037.43	8,151.07
505	.00	.00	.00	438.50	.00	438.50
506	.00	.00	.00	297.86	.00	297.86
507	3,041.93	.00	.00	.00	.00	3,041.93
508	.00	.00	.00	.00	1,859.67	1,859.67
509	40.00	.00	.00	.00	640.00	680.00
510	.00	.00	.00	.00	25,668.42	25,668.42
511	.00	.00	.00	.00	480.00	480.00
512	649.28	203.70	637.98	.00	.00	1,490.96
513	.00	173.00	.00	.00	.00	173.00
514	177.14	.00	.00	.00	.00	177.14
515	.00	.00	.00	.00	8,031.79	8,031.79
516	320.00	.00	.00	.00	.00	320.00
517	.00	.00	.00	.00	.00	.00
601	59.86	4.28	78.50	88.90	17,970.04	18,201.58
602	460.46	22.24	231.65	8.88	7,803.02	8,526.25
603	.00	.00	.00	.00	.00	.00
604	.00	.00	.00	.00	98.99	98.99
605	1,560.51	.00	.00	.00	3,858.45	5,418.96
606	640.00	.00	.00	.00	.00	640.00
607	.00	.00	.00	.00	.00	.00
608	.00	.00	.00	.00	.00	.00
609	.00	.00	.00	.00	.00	.00
TOTAL	2,760,591.12	5,450.60	19,803.52	661,934.68	3,474,137.13	6,921,917.05

Summary of Types of Reservations

I—Union Pacific Railway—Coal or Stone

CODE

101 "Reserving to said Company and its assigns all coal that may be underneath the surface of the land herein described."

102 "Reserving to the first party any coal that may be underneath the surface of the land herein described."

103 "Reserving to said second party and assigns any coal that may be underneath surface of said land."

104 "It being clearly understood by the third party hereto that this deed shall not apply to any coal that may be underneath the surface of the land herein described, but coal shall be the exclusive property of the Railway Company."

105 "This deed shall not apply to any coal that may be underneath the surface of the land herein described, but the coal shall be the property of the Railway Company."

106 "Reserving to said Company and its assigns all coal that may be underneath the surface of the land herein described, and exclusive right to prospect and mine for same."

107 "Reserving to said Company and its assigns all coal and stone that may be underneath the surface of the land herein described."

108 "It is expressly understood and agreed by the second parties hereto and it is a part of the consideration for which this land is now sold, that all the stone

Summary of Types of Reservations

CODE

upon the land herein described and all the ground that may be required in the work of quarring and transporting the stone from said land is reserved by the party of the first part for its own use and benefit."

109 "The Union Pacific Railway Company's reservation of the right to mine coal under the surface."

II—Union Pacific Railway—Coal and Other Minerals

201 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands."

202 "It is also agreed and understood that the party of the first part shall have the right to prospect for coal and other minerals within and underlying said lands."

203 "Reserving to said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands."

204 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands." Not redeemed from tax sale.

205 "The Union Pacific Railway Company reservation of undivided one-half interest—reserving however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said land."

Summary of Types of Reservations

CODE

206 "Reserving, however, to the said Union Pacific Railway Company its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals within and underlying said lands."

207 "Reserving, however, to the said Union Pacific Railway Company its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals within and underlying said lands." Not redeemed from tax sale.

208 "Undivided ½ interest to the coal rights only."

209 "Undivided ½ interest in the Union Pacific Railway Companies reservation of 'It is also agreed and understood that the party of the first part shall have the right to prospect for coal and other minerals within and underlying said lands."

210 "Reserving, however, to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals, excluding sand and gravel, within and underlying said lands." Not redeemed for tax sale.

211 "Undivided ½ interest in reserving, however, to the said Union Pacific Railway Company and its successors, grantees or assigns, the exclusive right to prospect for coal and other minerals."

III—Union Pacific Railroad—Coal

301 "Coal only."

302 "Reserving all coal underneath surface with exclusive right to mine and prospect for same."

303 "Coal and Iron."

Summary of Types of Reservations

IV—Union Pacific Railroad—Coal and Other Minerals

CODE

401 "Coal and Other Minerals."

402 "Undivided ½ interest in coal and other minerals."

403 "Coal and other Minerals not redeemed from tax sale."

404 "Coal and other Minerals except lime stone rock."

405 "All Minerals except coal."
(All other Minerals—except coal).

406 "Coal and other Minerals and Timber."

407 "Coal and other Minerals and water needed for Railroad purposes."

408 "Coal and other Minerals and stone."

409 "Coal and other Minerals and fossils."

410 "Coal and other Minerals, building stone and Potter's clay."

411 "Coal, stone, slate and other minerals."

412 "Also, excepting and reserving to said Union Pacific Railroad Company its successors and assigns the exclusive right to quarry stone and prospect for coal and other minerals, within or underlying said lands."

413 "Natural gas, coal and other minerals."

414 "Reservation of ½ interest in coal and ¼ interest in other minerals."

415 "Coal and other minerals excluding those on the surface to a given point below."

Summary of Types of Reservations

CODE

V—Union Pacific Railroad—Oil, Coal and Other Minerals

501 "Oil, Coal and Other Minerals."

502 "Undivided ½ interest in oil, coal and other Minerals."

503 "Oil, Coal and Other Minerals. Not redeemed from tax sale."

504 "Oil, Coal and Other Minerals and Timber."

505 "Oil, gas, coal and Other Minerals."

506 "Coal, salt, oil and Other Minerals."

507 "Oil, coal, Other Minerals, Water and Water Rights."

508 "Oil, coal, and Other Minerals and Gravel."

509 "Oil and Other Minerals except Coal."

510 "Oil, coal and Other Minerals and Fossils."

511 "Oil, coal, and Other Minerals not including Sherman Gravel."

512 "Oil, coal, and Other Minerals except Sand and Gravel."

513 "Oil, coal and Other Minerals except Water, Sand, Gravel, and Limestone Rock."

514 "Oil, coal and Other Minerals excluding those on the surface to a given point below."

515 "Gas, oil, and Other Minerals."

516 "Oil, Coal and Other Minerals excluding Limestone Rock."

517 "Coal, Oil and Other Minerals without Right of Entry."

Summary of Types of Reservations

VI—Union Pacific Railroad— All Minerals and Mineral Rights

CODE

601 "All Minerals and all Mineral Rights."

602 "All Minerals and All Mineral Rights without the right of entry."

603 "All Minerals and All Mineral Rights and Timber."

604 "Reserve all Minerals and Mineral Rights excluding those on the surface to a given point below."

605 "Undivided ½ interest All Minerals and Mineral Rights."

606 "Undivided ½ interest of an undivided ½ interest All Minerals and Mineral Rights."

The Pacific Railroad Act of July 1, 1862, ch. 120, §§ 3 and 15, 12 Stat. 489, as amended, Act of July 2, 1864, ch. 216, 13 Stat. 356.

Section 3 of the Pacific Railroad Act of 1862 provided:

> SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preëmption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Section 3 was amended by section 4 of Act of July 2, 1864, ch. 216, 13 Stat. 356. The amending section provided:

> SEC. 4. *And be it further enacted,* That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by

inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the commissioner of the general land-office, in conformity with the provisions of the preëmption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one

of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land-office.

Section 15 of the Pacific Railroad Act of 1862 provided:

SEC. 15. *And be it further enacted,* That any other railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, at such places and upon such just and equitable terms as the President of the United States may prescribe. Wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto.

Section 15 was not amended by the 1864 Act.

Statutory Appendix

Wyoming Federal Court State Law Certificate Procedure Act

(Wyo. Stat. §§ 1-13-104 *et seq.* (1977))

§ 1-13-104. *Questions from federal courts; generally.*

W.S. 1-13-104 through 1-13-107 is cited as the "Federal Court State Law Certificate Procedure Act." (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-105. *Same; definitions.*

(a) As used in this act:

(i) "Certificate procedure" means the procedure authorized herein by which a federal court in disposing of a cause pending before it submits a question of state law to the supreme court for determination;

(ii) "Federal court" means any court of the United States of America including the supreme court of the United States, courts of appeal, district courts and any other court created by act of congress;

(iii) "Supreme court" means the supreme court of Wyoming. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-106. *Same; authority of supreme court.*

The supreme court may answer questions of law certified to it by a federal court when requested by the certifying court if there are involved in any proceeding before the federal court questions of law of this state which may be determinative of the cause then pending in the federal court, and as to which it appears to the federal court there

is no controlling precedent in the existing decisions of the supreme court. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

§ 1-13-107. *Same; rules.*

The Supreme Court may adopt rules of practice and procedure to implement or otherwise facilitate utilization of certificate procedure. (Laws 1975, ch. 78, § 1; 1977, ch. 188, § 1.)

Wyoming Rules of Appellate Procedure
Rule 11

Rule 11. Certification by Federal Courts of Questions of Law

Rule 11.01. ***Power to answer.***

The Supreme Court may answer questions of law certified to it by a federal court when requested by the certifying court, if there is involved in any proceeding before it a question of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

Rule 11.02. ***Method of invoking.***

Rule 11, W.R.A.P., may be invoked by an order of any of the courts referred to in Rule 11.01, W.R.A.P., upon said court's own motion or upon the motion of any party to the cause.

Rule 11.03. ***Contents of certification order.***

A certification order shall set forth the question of law to be answered; and a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Rule 11.04. ***Preparation of certification order.***

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court

may require the original or copies of all or of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

Rule 11.05. *Costs.*

Fees and costs shall be the same as in civil appeals docketed before Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Rule 11.06. *Briefs and argument.*

Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his brief within thirty (30) days from the date of receipt of the notice, and the opposing party within thirty (30) days from service upon him of copies of plaintiff/appellant's brief. Brief shall be in the manner and form of briefs as provided in Rule 5, W.R.A.P. Oral arguments shall be as provided in Rule 6, W.R.A.P.

Rule 11.07. *Opinion.*

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

Office-Supreme Court, U.S.
FILED
MAR 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1412

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

v.

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 30, 1983

QUESTIONS PRESENTED

1. Did a provision of the Union Pacific land grant statute subjecting the granted lands to "settlement and preemption" under certain circumstances prohibit the Railroad from reserving minerals when it sold the lands at issue over 70 years ago to a ranching corporation that was not a settler and could make no claim to settlement and preemption rights?

2. Did the Court of Appeals abuse its discretion in declining to grant a last-minute request to certify to the Wyoming Supreme Court the interpretation of the mineral reservation in the deeds at issue, where (a) the meaning of the reservation had already been fully litigated and decided in two prior decisions of the Court of Appeals, (b) the Wyoming Supreme Court had cited the first federal decision on the question with approval and there were no Wyoming decisions even arguably to the contrary, and (c) there was uncertainty whether the state court would agree to decide the question if certified?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1412

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC., d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

v.

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This Brief is submitted jointly by respondents Union Pacific Land Resources Corporation and Champlin Petroleum Company, and by respondent Amoco Production Company, who were the appellees in the court below, in opposition to the Petition for Certiorari in this case.

COUNTERSTATEMENT OF THE CASE

This is an action to quiet title to minerals in certain Wyoming lands granted to a predecessor of Union Pacific Railroad Company ("the Railroad")[1] and sold by deeds

[1] The grant was made to "The Union Pacific Railroad Company," a federally chartered company. That company was consolidated with other federal companies in 1880 to form Union Pacific Rail*way* Com-

executed in 1908 and 1909 ("the Deeds") that expressly reserved to the Railroad "all coal and other minerals." The Deeds conveyed these and other lands, subject to the mineral reservations, to a corporate commercial purchaser named Rigby Ranch Company ("Rigby"). Petitioners Moench Investment Company, Ltd., and Thousand Peaks Ranches, Inc. ("petitioners" or "Moench"), acquired Rigby's interest in the lands in 1936 and 1939.

In 1979, in the wake of oil and gas discoveries in the vicinity of these lands, Moench for the first time asserted claims to the minerals reserved by the Railroad 70 years before. One petitioner brought a suit in Utah federal court[2] contending that identical reservations in conveyances of neighboring Utah lands to Rigby were invalid as contrary to the "settlement and preemption" proviso of the Pacific Railroad Act of 1862 ("the Union Pacific Act"), which gave preemption rights to settlers on such Union Pacific land grant lands as had not been sold or disposed of within three years after completion of the railroad line authorized by the Act.[3] The Utah suit also contended that, under Utah law, oil and gas were not among the "minerals" reserved. The other petitioner brought a suit in Wyoming state court seeking interpretation of the same mineral reservations under Wyoming law with re-

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pany. The present Railroad, a Utah corporation, acquired the properties of the Rail*way* at mortgage foreclosure sales in 1898.

[2] *Moench Inv. Co.* v. *Union Pac. R.R.*, No. C-79-0914 (D. Utah), filed April 4, 1979.

[3] Section 3 of the Act provides in pertinent part that all lands granted thereunder "which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." 12 Stat. 489, § 3 (1862).

spect to some 109 acres of Wyoming land conveyed by one of the Deeds at issue here.[4]

Respondents[5] subsequently brought the present Wyoming federal court suit, which parallels Moench's Utah federal court suit, seeking to quiet title to the minerals reserved by the Railroad in the rest of the Wyoming lands owned by petitioners. This suit presents the same question of federal statutory law as Moench's suit in the District of Utah. It also requires interpretation of the same mineral reservations, albeit under Wyoming rather than Utah law. Respondents submitted the federal statutory question simultaneously to the two district courts on motions for summary judgment, requesting prompt resolution of the question by either or both courts. The question was decided by the District of Wyoming, and the District of Utah thereupon stayed its consideration of that question pending final judgment on appeal in this case.

In granting summary judgment to respondents, the District of Wyoming held that the reservations at issue "are lawful and valid reservations of minerals according to their terms, and are in no way contrary to or inconsistent with the Union Pacific Act." (App. 13a, ¶ 11.) The District Court also held, following its own prior decisions later affirmed by the Court of Appeals, that under Wyoming law the reservations unambiguously include oil and gas.

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[4] *Thousand Peaks Ranches, Inc.* v. *Union Pac. R.R.*, No. 69-1270 (3rd Dist., Uinta County, filed March 12, 1979), *removed*, No. C79-091K (D. Wyo.), *app. from summary judgment pending*, No. 83-1269 (10th Cir.).

[5] Respondents are, respectively, successors to the mineral interests reserved by the Railroad and an oil and gas lessee of one of these successors.

The Court of Appeals unanimously affirmed both these holdings. It rejected Moench's central contention that the settlement and preemption proviso impliedly required the Railroad to convey the entire fee whenever it sold land grant lands, and thus prohibited the reservation of minerals. The court noted that the language of the proviso does not "suggest" any such duty and there is "no legislative history that supports [Moench's] interpretation of the clause." (App. 7a.)

The court went on to say that "[a]t most," the proviso might have required conveyance of the entire fee to "*settlers seeking preemptive rights* to lands neither sold nor disposed of within three years of completion of the railway." (App. 7a, emphasis added.) The Rigby corporation concededly was not a settler and had no preemption rights (Petition at 16 n.14); and the possibility that a preempting settler might have had a claim that included minerals provided no support for petitioners' claims. The court then explained that there was no need to consider the possible rights of a hypothetical settler to lands not timely "sold or disposed of," because the lands in question "*were* sold or disposed of" by mortgage within three years of the railway's completion and had been "sold upon foreclosure of the mortgages" to the present Railroad (which later conveyed the surface to Rigby). (App. 8a, emphasis in original.)

As to the scope of the mineral reservation, the court relied upon its own prior interpretation of an identical Union Pacific mineral reservation under Wyoming law and on the analysis of Wyoming law by the Wyoming District Court in that case.[6] Following those holdings, the court held that oil and gas are "minerals" within the

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[6] *Amoco Production Co.* v. *Guild Trust*, 461 F. Supp. 279, 283 (D. Wyo. 1978), *aff'd*, 636 F.2d 261 (10th Cir. 1980), *cert. denied*, 452

meaning of the reservation and that, "because the phrase [all coal and other minerals] is unambiguous, there is no need to resort to . . . supplementary materials . . . to determine the plain meaning of the reservation." (App. 10a, citation omitted.)

After the case was fully briefed and set for oral argument in the Court of Appeals, Moench requested for the first time that the interpretation of the mineral reservation be certified to the Wyoming Supreme Court for an advisory opinion as to Wyoming law.[7] No such request had been made in the District Court, in the docketing statement of issues on appeal, or in petitioners' main brief or reply brief on appeal. The belated request for certification did not explain why Moench had suddenly concluded that certification to a state court was required for a question which the Court of Appeals had already decided, and which Moench was simultaneously asking a Utah *federal* court to resolve under Utah law. The court declined to certify this question.

REASONS FOR DENYING THE WRIT

I. The Union Pacific Act Contention Tendered By The Petition Does Not Support Petitioners' Claims And Is Otherwise Inappropriate For This Court's Review.

The Petition asks this Court to decide the effect of an 1898 mortgage foreclosure sale on the hypothetical rights of settlers who might at some time seek to preempt Union Pacific land grant lands. That question is not presented by the facts of this case, since petitioners and their prede-

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U.S. 967 (1981). That interpretation was also reaffirmed in *Guild Trust* v. *Union Pac. Land Resources Corp.*, 475 F. Supp. 726 (D. Wyo. 1979), *aff'd*, 682 F.2d 208 (10th Cir. 1982).

[7] Motion of Defendants-Appellants for Certification to the Wyoming Supreme Court Pursuant to WYO. STAT. § 1-13-106, April 9, 1982.

cessor were not settlers or preemptors and since, as the Court of Appeals made clear, their interpretation of the Act is untenable regardless of the effect of the foreclosure sale.

In any event, the foreclosure issue raised by the Petition is of at most academic interest, unworthy of this Court's attention. It implicates no broad legal principle, and there is no showing that there are preempting settlers who have a stake in its resolution.

A. The Foreclosure Issue Is Of No Aid To Petitioners' Claim.

Petitioners' challenge to the validity of the mineral reservations depends on their contention that the settlement and preemption proviso of the Union Pacific Act should be read as a prohibition against mineral reservations by the Railroad in its sales of land grant lands to non-settlers like petitioners' predecessor, Rigby Ranch Company. Both courts below unequivocally rejected that interpretation of the statute. The Court of Appeals said:

> Neither do we find Moench's "settlement and preemption" clause argument persuasive. The language of the clause in no way suggests that the [railroad] grantee received only a limited fee barren of rights to whatever minerals might later be discovered. *Nor does the language suggest that the grantee was required to convey its entire fee to a purchaser.* Moench points to no legislative history that supports its interpretation of the clause. *At most the clause requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights* to lands neither sold nor disposed of within three years of completion of the railway.

(App. 7a., emphasis added.) As Moench admits, Rigby was not a settler and did not exercise preemption rights

on the lands at issue.[8] Therefore, under the plain language of the court's opinion, petitioners have no claim under the settlement and preemption proviso, whether or not settlers and preemptors had any rights under the proviso after the 1898 foreclosure sale.

The Petition nonetheless does not present for this Court's review the question that is dispositive of petitioners' claims, and for good reason. Moench has yet to state a coherent argument as to how a proviso subjecting undisposed-of lands to "settlement and preemption" could be read to prohibit mineral reservations in admittedly lawful sales of the lands that did not involve any settlement or preemption. It would be possible at least to comprehend a contention that all sales to non-settlers were themselves impliedly forbidden, on the theory that lands not disposed of within three years of completion should have been retained by the Railroad for the benefit of prospective settlers; but this is an argument petitioners understandably do not make, since it would defeat not only their claim to the minerals but their own title to the surface as well. The argument they attempt to make in its place—that the Railroad's alleged obligations to convey minerals *to settlers* required it to sell minerals to *non-settlers* (thereby making the minerals irrevocably unavailable to settlers)—does not pass the threshold of

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[8] Petition at 16 n.14. Whether "settlement and preemption like other lands" refers to the procedures authorized by the Preemption Act of 1841, 5 Stat. 453, or also includes homesteading under the Homestead Act of 1862, 12 Stat. 392, lands could be acquired through settlement only by bona fide individual settlers who actually settled the lands, and only in lots not larger than 160 acres per settler. Rigby was a corporation, not a settler; and it acquired a total of some 5,000 acres of land grant land in the Deeds at issue alone—over 30 times the maximum allowed to any settler.

minimum rationality.[9] It has no colorable support in the language or legislative history of the proviso or in any court decision.[10] The Court of Appeals' rejection of Moench's interpretation of the settlement and preemption proviso is unassailable, and the Petition is not so bold as to assail it directly.

The Petition does argue that the court's interpretation of the plain words of the proviso is inconsistent with the "governmental policy of guarding against monopolies of public lands by large corporations or single individuals." *Platt* v. *Union Pacific Railroad Co.*, 99 U.S. 48, 64 (1879). In fact, in the cited *Platt* case, this Court dis-

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[9] Petitioners contend that the reservation of minerals upon the sale of the surface to Rigby frustrated the settlement and preemption proviso by making it impossible for settlers thereafter to preempt the minerals. (Petition at 16-17.) But if the Railroad *had* conveyed the minerals to Rigby, they would have been equally unavailable for settlement and preemption. It was in fact the sale of *the surface* to a non-settler that prevented any future settlement and preemption of the lands. The reservation of the minerals in such a sale had no effect on any rights of prospective settlers. The Railroad was permitted, but not required, to sell the surface to non-settlers so long as there had been no settlement and preemption. *Union Pac. R.R.* v. *McShane*, 24 F. Cas. 640, 643 (C.C.D. Neb.) (No. 14,382), *aff'd*, 89 U.S. 444 (1874). As the court below held, it was equally free to sell or not to sell the minerals. Petitioners' theory that the Railroad had only two choices—to sell its entire interest to the Rigby corporation or to retain its entire interest for settlers—is pure invention, unsupported by the language or the legislative history of the statute.

[10] Indeed, petitioners have never contended that the statute could be construed to support petitioners' claim on summary judgment; their argument in the courts below was that they were entitled to discovery and a trial at which they would attempt to prove an alleged underlying congressional intent as a question of fact. Such attempts to imply unexpressed conditions in the Union Pacific Act are barred by decisions of this Court. *See* note 11 *infra*.

missed that very policy as one of the "incidental considerations" in the enactment of the Union Pacific Act, *id.* at 60, and held that in the settlement and preemption proviso that policy "was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant." *Id.* at 65. To the extent that discouraging monopolies was a policy of the Union Pacific Act, it was implemented by subjecting unsold lands to settlement and preemption, not by requiring sale of the land grant to large ranching corporations like Rigby.[11]

The question the Petition instead raises for review—whether settlement and preemption was possible after the foreclosure sale—was addressed by the Court of Appeals only in the context of considering the hypothetical possibility that "a settler seeking land under [the settlement and preemption proviso]" might be able to make the claim that the court had concluded Moench could not make. (App. 7a-8a.) Having determined that

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[11] Moreover, the attempt to imply in the proviso a prohibition not even suggested by its language flies in the face of this Court's recent unanimous confirmation in *Leo Sheep Co.* v. *United States* that there are no lurking unexpressed conditions to the Union Pacific land grant under the Union Pacific Act. 440 U.S. 668, 679, 681 (1979). As this Court reaffirmed in *Leo Sheep:*

> the intent of Congress in making the Union Pacific grants was clear: "it was to aid in the construction of the road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned* . . . ."

Id. at 679 (emphasis added) (quoting *Missouri, Kansas & Texas Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878). *Accord, United States* v. *Union Pac. R.R.*, 28 F. Cas. 333, 340 (C.C.D. Conn. 1873), *aff'd*, 98 U.S 569 (1878) ("Whatever trust, guaranty, or protection [Congress] desired was reserved in express terms [in the Pacific Railroad Act]. *Implications are thereby excluded.*") (emphasis added).

the proviso "[a]t most . . . requires the grantee to stand in the government's shoes *with respect to settlers seeking preemptive rights* . . ." (App. 7a, emphasis added), the court had reason not to leave open the unwarranted implication that land grant lands are presently available for settlement and preemption, even though that hypothetical possibility was of no avail to Moench in any event. The court's conclusion that the possibility of settlement and preemption did not survive the foreclosure sale is, insofar as petitioners' claims are concerned, mere surplusage. A contrary conclusion would leave them still without a claim.

B. The Foreclosure Issue Is Otherwise Of Minimal Significance.

The Court of Appeals' treatment of the foreclosure issue does not, in any event, raise any substantial question. The effect of the foreclosure is an obscure question arising from unique circumstances under a *sui generis* statute. Neither the merits of this question nor its potential impact are worthy of this Court's review.

The Court of Appeals' discussion of the effect of the foreclosure sale follows routinely from this Court's interpretation of the settlement and preemption proviso in *Platt*, *supra*. The proviso opens to possible settlement and preemption only such lands as had not been "sold or disposed of" by the grantee within three years after completion of the entire railway. In *Platt*, this Court held that the mortgage on the land grant lands executed by the original railroad grantee in 1867 was a "disposition" within three years after completion for purposes of the proviso, so that the lands did not become subject to settlement and preemption. That holding disposed of all possible claims under the proviso, except under one contingency: If the mortgage debt were paid when due, the

mortgage trustees were to convey back to the original grantee (the mortgagor) any lands that had not been sold while subject to mortgage, thereby extinguishing the mortgage. 99 U.S. at 64. In that event, it might have been argued that the original disposition had not been final, and that the possibility of settlement and preemption was thereby revived. The *Platt* Court did not decide that settlement and preemption requirements would revive in the event of such a reconveyance to the mortgagor; it only made clear that it was expressing no view on that question. *Id.*

The court below likewise found it unnecessary to decide this question left open in *Platt*, because the contingency hypothesized in *Platt* did not occur. The lands were never reconveyed to the mortgagor (which had been consolidated with other land grant companies as Union Pacific Rail*way* Company), but were "in fact sold upon foreclosure of the mortgages" to the Railroad for the benefit of the Railway's creditors. (App. 8a.) After the foreclosure sale, there was no longer any possibility that the lands conveyed to the Railroad could revert to the Railway, and the question left open in *Platt* became moot. In so concluding, the Court of Appeals did not extend *Platt* or decide any new legal question. It merely explained why, under *Platt*, there is no longer any possibility that the "disposition" of the lands by mortgage in 1867 was not final.[12]

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[12] There can be no serious argument that the lands sold upon foreclosure were sold subject to settlement and preemption requirements. The Interior Department expressly recognized, in approving the foreclosure sale, that it would preclude the possibility of settlement and preemption. *Union Pac. R.R.*, 29 L.D. 38, 39, 41 (1899). The mortgage enabled the trustee to convey an unrestricted fee in the lands. *Platt*, 99 U.S. at 62. If the mortgaged lands had been

The Petition misconstrues this uncontroversial recital as a holding that the 1898 foreclosure sale was itself a "sale or disposition" within three years after completion within the meaning of the proviso. (Petition at 17.) No such argument was made to the Court of Appeals, and it is implausible that the Court thought that a sale occurring some 30 years after completion of the railway was a sale or disposition "within three years." When the court below states that "the lands at issue *were* 'sold or disposed of . . . within three years' of the railway's completion,"[13] the "disposition" it is referring to is unmistakably a disposition by mortgage as recognized in *Platt* and as discussed in the immediately following paragraph of the Court of Appeal's opinion. (App. 8a.)

The question whether such a "disposition" would be undone by the subsequent extinguishment of the mortgage is unique to the Union Pacific Act. Only under that pioneer land grant did a mortgage of the grant "dispose of" the lands and thereby relieve the original grantee of any obligation to open the lands to settlers. Under later land grant acts such as those construed by this Court in the *Northern Pacific*[14] and *Oregon & California*[15] cases relied upon in the Petition (at 17-19), mortgaging the lands had no such effect as a "disposition," and the ques-

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burdened by the settlement and preemption proviso, the mortgage could not have fulfilled its purpose, as explained in *Platt*, of generating the large sums of money needed for construction. *Id.* at 61-62.

[13] App. 8a (emphasis in original).

[14] *United States* v. *Northern Pac. Ry.*, 311 U.S. 317 (1940).

[15] *Oregon & California R.R.* v. *United States*, 238 U.S. 393 (1915); 243 U.S. 549 (1917).

tion of the effect of extinguishment of the mortgages on a prior "disposition" by mortgage did not arise.[16]

The statute construed in *Oregon & California* contained a wholly different proviso, requiring without qualification that all granted lands "shall be sold to actual settlers only" in limited quantities at a prescribed price; and the Court held that it was a breach of that proviso *to sell* any interest in the lands to non-settlers like Moench and its predecessor. That holding has no relevance to petitioners' mortgage argument.

The statute in *Northern Pacific* did include a settlement and preemption proviso, subjecting to settlement and preemption lands not sold or disposed of within five years after completion of the railroad. But as the Petition concedes (at 18 n.15), that proviso contained additional language, referring expressly to the effect of a mortgage, that caused this Court to hold that the Northern Pacific's execution of a mortgage within five years did *not* relieve the grantee of its obligations of settlement and preemption even while the mortgage was outstanding. 311 U.S.

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[16] As this Court has often noted, Congress had changed its liberal policy toward railroad land grants by 1869, after the Union Pacific and other early experimental grants had proved successful. *Oregon & California R.R.* v. *United States*, *supra*, 238 U.S. at 414, 416; *Great Northern Ry.* v. *United States*, 315 U.S. 262, 273-75 (1942); *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 125-27 (1957) (Frankfurter, J., dissenting). The stricter requirements as to settlers imposed by the Oregon & California statute in 1869 and by amendment to the Northern Pacific statute in 1870 reflect that change of policy. The Union Pacific Act was the product of a different policy, in which the paramount objective was to provide a grant rich enough to induce private investors to attempt to build the first transcontinental railroad. *Platt*, *supra*, 99 U.S. at 48, 60, 65; *United States* v. *Union Pac. R.R.*, 91 U.S. 72, 80-81 (1875).

at 368.[17] Thus, unlike the Union Pacific lands under *Platt*, the Northern Pacific's lands were to be opened to settlement and preemption after five years "*whether the lands were then subject to mortgage or not.*" *Id.* (emphasis added). Since *Platt* was therefore inapplicable, the question of mortgage extinguishment left open in *Platt* was not presented.

The Petition nonetheless contends that the treatment of the mortgage foreclosure issue in the court below is inconsistent with *Northern Pacific* and *Oregon & California* because the provisos construed in those cases were held applicable to successors of the original grantees who, like the Railroad, acquired land grant properties through mortgage foreclosure sales. (Petition at 17-19.) But the issue here is not whether the Union Pacific Act bound the Railroad as a foreclosure purchaser to the same extent that it bound the original grantee; the issue is whether the lands were finally "disposed of" by the original grantee's mortgages, so that the proviso was satisfied. *Platt* had held that the Act did not require the original grantee to open lands to settlement and preemption after the execution of the 1867 mortgage. The court below merely concluded that the proviso *likewise* imposed no such requirement on the successor purchaser at the foreclosure sale, since the foreclosure sale resolved any question about the finality of the mortgage "disposition."

Moreover, even if the court's view of the effect of the foreclosure were mistaken, the mistake would be of hardly any consequence. The laws authorizing settlement and preemption on public lands, to which the land grant lands

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[17] The *Northern Pacific* proviso's terms subjected to settlement and preemption not only lands "not sold or disposed of" within the prescribed time, but also lands that "*remain subject to the mortgage by this act authorized . . . .*" 16 Stat. 378, 379 (1870) (emphasis added).

were made subject under the proviso, have been repealed,[18] and it is no longer possible to settle or preempt lands.[19] Thus, if the proviso "requires the grantee to stand in the government's shoes with respect to settlers seeking preemptive rights," as the Court of Appeals hypothesized, the lands would not be burdened even if the proviso had not been satisfied, because there is no body of qualified settlers that could take advantage of it.

In sum, the esoteric question tendered for this Court's review under the Union Pacific Act is of no help to Moench's claims and of scant import to anyone else. In any event, it would be singularly inappropriate to adjudicate a question of hypothetical settlers' rights on the petition of Moench, which is not a settler and is not asserting such rights.

II. The Discretionary Denial Of A Belated Request To Certify A Question The Court Below Had Already Twice Decided Is Wholly Consistent With The Standards For Certification That Have Been Articulated By This Court.

Moench's last-minute request for certification of the interpretation of the mineral reservations at issue, made only after three years of litigation in the District Court and on appeal, appears to have been made primarily for purposes of this Petition. The Court of Appeals had previ-

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[18] The statutes creating settlement and preemption rights on public lands were repealed by the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1097, § 4. In 1873, it was clear to this Court that these were the laws to which lands granted under the Union Pacific Act were to be subjected. *See Railway Co.* v. *Prescott*, 83 U.S. (16 Wall.) 603, 609 (1873). But if the lands were also subject to settlement under the homestead laws, as petitioners have contended, those laws too have been repealed. Act of October 21, 1976, 90 Stat. 2787, 2788, § 702.

[19] *McDonald* v. *Union Pac. Ry.*, 97 N.W. 440, 441 (Neb. 1903).

ously declined to certify the very same question of Wyoming law in two prior cases; and the argument for certification in this case was far weaker after the meaning of the mineral reservation had already been fully litigated and finally decided on the merits. Moreover, Moench's contention that this question under Wyoming law is unsuited for decision by a federal court is difficult to reconcile with its own complaint seeking federal court resolution of the very same question under Utah law.

The Tenth Circuit is thoroughly familiar with the proposition that certification is in many circumstances an efficient means of deciding doubtful questions of state law presented in federal court suits. It has made use of certification on a number of occasions.[20] But, as petitioners acknowledge, resort to certification in a particular case is discretionary, not mandatory. The use of this procedure "rests in the sound discretion of the federal court." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 390-91 (1974) ("*Lehman*").

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 395 (Rehnquist, J., concurring). It is difficult to imagine a case in which the exercise of the court's discretion to decide such a question without certification was better founded than in this one.

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[20] *E.g.*, *Parcell* v. *Governmental Ethics Comm'n*, 626 F.2d 160 (10th Cir. 1980); *Hoadley* v. *Heggie*, 617 F.2d 589 (10th Cir. 1980) (per curiam); *United States* v. *Criterion Ins. Co.*, 587 F.2d 39 (10th Cir. 1978); *United States* v. *United Banks*, 542 F.2d 819 (10th Cir. 1976); *Imel* v. *United States*, 523 F.2d 853 (10th Cir. 1975).

First, petitioners' belated motion for certification in the Court of Appeals was an attempt to evade the application of *stare decisis* by seeking to have redecided in a different forum a question already squarely decided in two prior cases.[21] Certification is not available as a means of forum shopping to relitigate an adverse precedent. The Fifth Circuit, which has made unusually expansive use of certification, has nonetheless made clear that

> [o]nce a panel of this Court has settled on the state law to be applied in a diversity case, the precedent should be followed by other panels without regard to any alleged existing confusion in state law, absent a subsequent state court decision or statutory amendment which makes this Court's decision clearly wrong.

Lee v. *Frozen Foods Express, Inc.*, 592 F.2d 271, 272 (5th Cir. 1979).

The reason for this rule is apparent. In the absence of some clear change in the applicable law, for a federal court to certify a question it has previously decided would be counterproductive, resulting in inefficiency and delay rather than the savings of "time, energy, and resources"

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[21] *See* cases cited at 4 n.6 *supra*. The possibility of certifying the question at issue to the Wyoming Supreme Court was expressly presented in both those cases, and the Court of Appeals there also concluded that the question should not be certified. See Appellants' Motion to Stay Proceedings and Motion for Abstention or, in the Alternative, for Certification, 10th Cir. No. 79-1236 (Aug. 31, 1979); Appellants' Objection to Calendar Assignment, Motion for Stay and Motion for Abstention, 10th Cir. No. 79-1568 (Aug. 31, 1979); Order of October 9, 1979, 10th Cir. No. 79-1236 (Oct. 9, 1979). It is at least arguable that the denial of certification in that litigation was *itself* controlling authority when certification of the same question was sought below on the eve of oral argument in the Court of Appeals.

contemplated in *Lehman*, 416 U.S. at 390-91. That is so *a fortiori* in this case, where the request for certification was made only after three years of litigation in federal court. And because certification could not have resolved the federal issue in the case, it would have resulted in the sort of "pointless and wasteful burden" on judicial resources that attends any "piecemeal litigation." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, No. 81-1203, slip op. at 25 (U.S. Feb. 23, 1983).

Second, unlike this Court's decision in *Lehman*, this was not a case in which the federal court was unfamiliar with the state law to be applied. In *Lehman*, a federal court in New York was called upon to decide a complex and novel question of Florida law. This Court said that certification seemed particularly appropriate on those facts,

> in view of the novelty of the question and the great unsettlement of Florida law, *Florida being a distant state.* When federal judges in New York attempt to predict uncertain Florida law, *they act . . . as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.*

416 U.S. at 391 (emphasis added). In contrast, in its prior decisions of this question the Court of Appeals expressly relied on the expertise of the resident Wyoming District Judge on such questions of Wyoming law. *Amoco Production Co.* v. *Guild Trust*, 636 F.2d at 264, *supra* ("*Guild Trust*").[22]

Third, unlike the question certified in *Lehman*, the question for which Moench sought certification was not a

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[22] *See also Fox* v. *Ford Motor Co.*, 575 F.2d 774, 781-73 (10th Cir. 1978); *Neu* v. *Grant*, 548 F.2d 281, 287 (10th Cir. 1977) (citing additional cases).

close one under Wyoming law. The *Guild Trust* decision adopted the approach recommended under Wyoming law by an eminent oil and gas authority in a leading *Wyoming Law Journal* article,[23] and relied heavily on other Wyoming authorities.[24] More important, by the time the issue reappeared in the instant case, the District Court decision in *Guild Trust* had been cited with approval in an analogous context by the Wyoming Supreme Court, *Coronado Oil Co.* v. *Grieves*, 603 P.2d 406, 412 (Wyo. 1979);[25] and petitioners have not cited a single Wyoming

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[23] Kuntz, "The Law Relating to Oil and Gas in Wyoming," 3 *Wyo. L. J.* 107, 112-15 (1949), *cited in Guild Trust*, 636 F.2d at 265, and in *Lazy D Grazing Ass'n.* v. *Terry Land & Livestock Co.*, 641 F.2d 844, 846 n.5 (10th Cir. 1981).

[24] *Guild Trust*, 636 F.2d at 264-65 (citing cases). *Guild Trust* reached the conclusion shared by the Tenth Circuit in interpreting nearly identical federal reservations of "all coal and other minerals" that have been in pervasive use in Wyoming deeds for nearly 70 years. *Skeen* v. *Lynch*, 48 F.2d 1044 (10th Cir.), *cert. denied*, 284 U.S. 633 (1931). The Wyoming courts have squarely held that extrinsic evidence is inadmissible to interpret deeds that are unambiguous. Extrinsic evidence is admissible only if the mineral reservation has no settled meaning. *See Gregory* v. *Sanders*, 635 P.2d 795, 800 (Wyo. 1981); *Sunburst Exploration, Inc.* v. *Jensen*, 635 P.2d 822, 824-25 (Wyo. 1981); *Amoco Production Co.* v. *Stauffer Chemical Co.*, 612 P.2d 463, 465 (Wyo. 1980); *Shepard* v. *Top Hat Land & Cattle Co.*, 560 P.2d 730, 732 (Wyo. 1977).

[25] *Coronado* held that exploration for oil and gas is "mining" within the meaning of WYO. STAT. § 1-26-401 *et. seq.*, which allows corporations to condemn private property in order to obtain a way of necessity for, *inter alia*, mining purposes. The court cited *Guild Trust* and the authorities cited therein as showing that, when the 1907 statute was passed, in Wyoming "oil was considered generally to be a mineral and an oil well to be a mine." 603 P.2d at 411.

authority that casts doubt on the validity of the *Guild Trust* holding.[26]

Finally, it was uncertain whether the Wyoming Supreme Court would even accept a certified question in this case. That court had long been unreceptive to certification,[27] and although it finally did accept one certified question last year, it apparently still requires that the question certified be one that could finally resolve the entire case.[28] As noted above, certification could not have resolved the federal issue in this case, and the resulting uncertainty about the Wyoming Supreme Court's willing-

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[26] In addition, the conclusion of Wyoming law reached by the court below accords with the weight of authority in other states, that a reservation of "coal and other minerals" includes oil and gas as a matter of law. *See, e.g., Rowe* v. *Chesapeake Mineral Co.*, 156 F.2d 752 (6th Cir.), *cert. denied*, 329 U.S. 776 (1946); *Adkins* v. *Adams*, 152 F.2d 489 (7th Cir. 1945); *Shell Oil Co.* v. *Dye*, 135 F.2d 365 (7th Cir. 1943); *Burdette* v. *Bruen*, 118 W. Va. 624, 191 S.E. 360 (1937); *Failoni* v. *Chicago & N.W. Ry.*, 30 Ill. 2d 181, 195 N.E.2d 619 (1964); *Kentucky-West Virginia Gas Co.* v. *Browning*, 521 S.W.2d 516 (Ky. 1975); *Majors* v. *Easley*, 328 S.W.2d 834 (Ky. 1959); *Gibson* v. *Sellars*, 252 S.W.2d 911 (Ky. 1952); *Sellars* v. *Ohio Valley Trust Co.*, 248 S.W.2d 897 (Ky. 1952); *Schreier* v. *Chicago & N.W. Ry.*, 96 Ill. App. 2d 425, 239 N.E.2d 281 (1968); *Stewart Oil Co.* v. *Sohio Petroleum Co.*, 202 F. Supp. 952 (E.D. Ill. 1962), *aff'd*, 315 F.2d 759 (7th Cir.), *cert. denied*, 375 U.S. 828 (1963); *Warren* v. *Clinchfield Coal Corp.*, 166 Va. 524, 186 S.E. 20 (1936).

[27] See *Matter of Certified Question from the United States District Court, District of Wyoming: Hanchey* v. *Steighner*, 549 P.2d 1310 (Wyo. 1976). That decision imposed such a "severe restriction" on certification that Wyoming's certification statute was regarded as "virtually useless." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4248, at 526 (1978).

[28] *Rhodes* v. *Bush*, No. 5640 (Wyo. 1982) (Raper, J., concurring) (Wyoming certification statute requires that question be one that "may be determinative of the cause then pending in federal court").

ness to decide the state-law question if certified provided yet another reason not to protract this litigation further by an attempt at certification.

In the face of this compelling case against certification, petitioners seek to invoke the purported views of the State of Wyoming and the purported "opinion" of its Attorney General that the state-law issue was wrongly decided and that the issue should be submitted to the Wyoming state court. (Petition at 25.) The views ascribed to the State were expressed in litigation during the pendency of the *Guild Trust* suit by an Attorney General who had been co-counsel to the plaintiff in that case immediately before taking office, and who, upon taking office, brought parallel suits on behalf of the State of Wyoming involving Union Pacific mineral reservations on State lands. That Attorney General then sought to intervene in the *Guild Trust* case on appeal in support of his former client. After the final decision in the *Guild Trust* case, the State of Wyoming dismissed its own suits,[29] and is no longer claiming rights to oil and gas under Union Pacific mineral reservations in the form interpreted in this case. The State has taken no position in this litigation and is not supporting the Petition in this Court. In these circumstances, the litigating position once taken by a former Attorney General in the questionable circumstances described above is entitled to no weight on the question here presented.

For all these reasons, this case is not an example of the circumstances in which certification is a useful or even appropriate device, either for relieving congested federal

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[29] Stipulation of Dismissal with Prejudice, *State of Wyoming v. Union Pacific Corp.*, Civ. No. 3755 (3rd Dist., Sweetwater County, May 12, 1981).

dockets or for reliably ascertaining state law. The denial of certification below was a reasoned exercise of discretion, and it plainly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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No. 82-1412

Office-Supreme Court, U.S.
FILED
APR 8 1983
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC. d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

—against—

UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

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April 8, 1983

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No. 82-1412

IN THE

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OCTOBER TERM, 1982

MOENCH INVESTMENT COMPANY, LTD., a limited partnership, and THOUSAND PEAKS RANCHES, INC. d/b/a HOWELLS LIVESTOCK, INC., a corporation,

Petitioners,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

I.

The Claim Under the Pacific Railroad Act, Affecting Thousands of Landowners and Title to Millions of Acres in the West, Is Plainly Substantial and Warrants Review.

The determination by this Court as to whether the Union Pacific Railroad has violated Section 3 of the Pacific Railroad Act will affect the rights of surface owners with respect to almost seven million acres of land in the West. These lands include sections rich in oil and natural gas, valued in the many billions of dollars. They were acquired from the Union Pacific or its predecessors under the Pacific Railroad Act (the "Act") which the Petition asserts

necessarily precluded such subsurface reservations as part of the effort to effect Congress' avowed purpose of preventing landed monopolies from developing as a consequence of the land grants made in aid of the construction of a transcontinental railroad. *See Platt* v. *Union Pacific R.R.*, 99 U.S. 48 (1878). It is impossible to reconcile these facts, set forth in the Petition (at p. 5) and unchallenged by respondents, with respondents' assertion that the first question presented is of "minimal significance" and of "scant import" to any one other than petitioners. On the contrary, as the cases set forth in the Petition at p. 11 n. 9 reflect, this Court has consistently viewed as significant issues just such as are posed here involving railroads, land grant policies, millions of acres of land and thousands of landowners. The terms of the Act remain of vital concern today in judging the validity of the Railroad's claims.

With respect to the merits of the Pacific Railroad Act issue, the respondents struggle to interpret the Tenth Circuit's opinion in a fashion at odds with the Court of Appeals' own words and refuse to recognize that that court adopted one of the very interpretations which they themselves urged upon it. (Brief in Opposition at 11) (hereinafter "Br. Op.") Respondents assert that the Tenth Circuit held that this Court's decision in *Platt* v. *Union Pacific R.R., supra,* determined that the original mortgages of the land grant constituted a final disposition, satisfying the Act, leaving open only the possibility that a reconveyance to the Railroad upon satisfaction of the mortgage could alter this. But the Tenth Circuit did not so rule.* Rather, after noting that the question of what would occur with respect to unsold lands "'after the mortgage

* The *Platt* decision itself demonstrates that the Tenth Circuit would have erred had it adopted the interpretation now urged by respondents. The mortgaging of the lands in effect "stayed" application of the settlement and preemption clause. This Court in *Platt* made clear in language quoted by the Tenth Circuit that

shall be extinguished'" was left undecided in *Platt*, the Tenth Circuit continued:

> "We too need not consider the question, because the lands were in fact *sold upon foreclosure*. . . ." (Pet. at 8a) (emphasis added)

This is the Tenth Circuit's holding: the lands in question had been "sold" in the foreclosure. The Court of Appeals placed no reliance whatever upon any "disposition" language which would have been required had it considered the original act of mortgaging itself to have been controlling as respondents urge. Rather, the court held that a mortgage foreclosure transfer to the new railroad entity constituted a "sale" sufficient to satisfy Section 3. Although respondents assert that "[n]o such argument was made to the Court of Appeals" and characterize it as "implausible" (Br. Op. at 12), the argument adopted by the court was one explicitly urged upon it by each of the respondents.* Now, belatedly recognizing the facial inadequacy

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what happened to the lands once the mortgage was "extinguished" was not before it and was not being decided.

> "Nor are we now called upon to decide whether lands covered by the mortgage will not be open for preemption, if they shall remain unsold after the mortgage shall be extinguished. That question is not now before us." 99 U.S. at 64.

This Court did not limit the open questions to situations where the "mortgage debt [was] paid when due" as respondents suggest. (Br. Op. at 10-11) Rather, it left undecided the effect of any "extinguishment", by foreclosure or otherwise.

* In its brief to the Tenth Circuit respondent Amoco stated:

> "The mortgage foreclosure sale in 1899 of the land grant lands to the new Union Pacific Railroad Company, a Utah corporation, pursuant to court order and for value, undeniably constituted a sale and disposal of the old company's land." (Brief of Appellee Amoco Production Company at 19)

The Union Pacific respondents asserted that

> "the settlement and preemption proviso was extinguished either by the execution of the first mortgage in 1867, or in

of such an approach in light of this Court's rejection of just such argument in *United States* v. *Northern Pacific Ry.*, 311 U.S. 317 (1940), respondents attempt to disavow their own argument and the basis of the holding of which review is sought.

Respondents also emphasize that petitioner's predecessors were not settlers, as, indeed, they were not. But to conclude from this that Section 3 is irrelevant here is wholly to miss the point. Section 3 was designed both to benefit settlers *and* to prevent the creation of a landed monopoly in the Railroad.* The settlement and preemption clause was a mechanism designed to achieve these dual goals. (Pet. at 13-14) The statute must be interpreted with those policies in mind. When enacted, Sec-

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any event by the foreclosure and sale of the second mortgage in 1898." (Brief of Appellees Union Pacific Land Resources Corporation and Champlin Petroleum Company at 22)

* Respondents rely on *Platt* v. *Union Pacific R.R.*, *supra*, to support a claim that the latter policy was of only "incidental" significance. (Br. Op. at 9) Even if this reference in *Platt* (at variance in tone in this respect with other language in *Platt* itself, the Congressional history of Section 3 of the Act (see Pet. at 12-14) and this Court's earlier decisions) were accepted as wholly dispositive, respondents' argument that only settlers or pre-emptors can rely on Section 3 would be meritless. It accords *no* weight whatever to the Congressional anti-monopoly policy—a policy obviously flaunted by the Railroad's present ownership of more than seven million acres of the original land grant. Yet even *Platt*, while finding the anti-monopoly policy less significant than some other concerns, nevertheless recognized it to be one of Congress' "avowed object[s]" in enacting the legislation.

Moreover, the extent of this Court's departure in tone and language in *Platt* from its own decisions of but a few years earlier, may be traceable in no small part to what may now be seen as the lack of an actual case or controversy in *Platt*. As the record in the Tenth Circuit in the present case reflects, it has come to light in discovery in this case that Union Pacific's "opponent" in *Platt* was one of its own attorneys and that the lawsuit "against" the railroad was funded by the railroad itself. (Vol. VIII, Ex. 7-10, Record)

tion 3 prohibited the reservation of subsurface interests both because permitting such reservations would have frustrated settlement and preemption (since the subsurface held by the railroad could not be settled or preempted) and permitted a railroad land monopoly to develop. This basic element of Section 3 is unaffected by the passage of time, changes in or even repeals of homesteading or preemption laws. The Railroad was required either to sell land or to retain it in a form which subjected the land to settlement or preemption. Its failure to do so has resulted in perpetuation of just the landed monopoly Congress sought to avoid; the Railroad's means of accomplishing this frustration, the creation of subsurface reservations, violates Section 3 and is void.

Indeed, as the plaintiffs in a quiet title action, respondents must prevail on the strength of their own title. Violation of Section 3 would preclude their discharge of this burden wholly without regard to the identity of petitioners or their predecessors, a point respondents persistently seek to obscure. *See also* Pet. at 16-17, n. 14.

It is neither of "minimal significance" nor of "scant import" that the Union Pacific has, through its retention of public land grant lands, achieved just the land monopoly Congress sought to avoid and has done so in a manner violative of a statute explicitly designed to preclude that result. Such an issue, affecting thousands of landowners, millions of acres and billions of dollars, is worthy of this Court's review.

II.

The Failure of the Tenth Circuit to Certify a Question of Wyoming Land Law to the Wyoming Supreme Court Frustrates an Important State Interest and Warrants Review.

The most striking aspect of respondents' Brief in Opposition with respect to the issue of certification to the Wyoming Supreme Court is its *Catch-22* character. Thus, respondents seek to minimize the impact of the State of Wyoming's support for certification of the Wyoming law issue by noting that a brief *amicus curiae* was not filed in this action with this Court by the State of Wyoming and that the state "dismissed its own suits" (Br. Op. at 21) against the Railroad. What the respondents do not note is that the stipulation effected a settlement between the Union Pacific and the State and, far from simply "dismissing" the State's claims, provided that the Union Pacific would convey all its "right, title, and interest in and to the mineral estate, including without limitation any oil, gas, or liquid or gaseous hydrocarbons. . . ." with respect to one of the two parcels at issue.* What respondents also fail to disclose is that the Union Pacific had insisted upon an explicit clause barring the State of Wyoming from asserting any "interest" in this litigation as a condition to settling the litigation with the state referred to in the Brief in Opposition. It is solely the presence of that clause, rather than any of the reasons obliquely referred to by respondents, which has led the Attorney General of Wyoming to determine that the State was precluded from filing a brief *amicus curiae* in this Court.**

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* A copy of the settlement agreement referred to in the Brief in Opposition (p. 21 n. 29), is appended hereto at A1-A5.

** So that the Court may be fully informed as to the position of the State of Wyoming and the reasons for that position, we

Such circumstances, coupled with the extraordinary *ad hominem* nature of the challenge to the integrity of Wyoming's highest law enforcement officials, reinforce rather than diminish the concern that the state law issue be decided in state courts. They suggest the lengths to which the Union Pacific will go to limit the likelihood that Wyoming will be permitted to decide or even comment further on the issue. In any event, the earlier opinion of the Attorney General as to the incorrectness of the approach taken by the Tenth Circuit as to the state law issue presented here and the need for certification remains uniquely persuasive authority.

The respondents also capture an element of *Catch-22* in suggesting that once a federal court has ruled on a state law issue certification to the state court is thereafter improper. This wooden view of the relationship between state and federal courts is particularly disturbing in a situation where, as here, respondents have systematically thwarted, by removal and opposition to certification, every effort to obtain a definitive state court resolution of the Wyoming law issue. Respondents' approach puts a premium on such tactics. It reemphasizes the race to the courthouse and, as here, has had the effect of precluding any subsequent state court consideration of the state issue. This is particularly disturbing when the basic holding at issue is the product of deference to a single district judge by the federal appeals court.*

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annex to this brief, with the permission of the Attorney General of Wyoming, correspondence between the Attorney General and counsel for petitioners with respect to the possible submission by the State of a brief *amicus curiae*. *See* A6-A11.

* The reliance on the decision in *Coronado Oil Co.* v. *Grieves*, 603 P.2d 406 (Wyo. 1979) with respect to the underlying interpretation issue in the Brief in Opposition is misplaced. Even the Tenth Circuit has recognized that that decision is not "controlling." *Amoco Production Co.* v. *Guild Trust*, 636 F.2d 261, 265 (10th

Contrary to the respondents' suggestions, certification was sought on a timely basis in this case, briefed by all parties and argued to the Court. Certification is available in Wyoming.* The opinion cited by respondents in *Rhodes* v. *Bush*, No. 5640 (Wyo. April 28, 1982), makes precisely the opposite point from that for which respondents cite it. That case is explicit in noting that while in the past the Wyoming Supreme Court had required matters to be final in all respects, the question before it in that case, accepted for certification, did not fit that category; Justice Raper explicitly agreed that the matter should be reviewed and expressed the hope that in the case before it, involving certification of an interlocutory federal question, the Wyoming court would be "setting a new precedent for the consideration of [*intrastate*] interlocutory questions, the answer to which may be dispositive of a case at an early stage. . . . I see no reason to treat an interlocutory question from a federal court any differently than an interlocutory question from a state district court." (A copy of this opinion is appended hereto at A12.) The Wyoming Supreme Court remains ready to decide issues of Wyoming law certified to it by the federal courts. It should be given the opportunity finally to resolve this important question of state law.

Cir. 1980), *cert. denied*, 452 U.S. 967 (1981). The Tenth Circuit, of course, has acknowledged that "no Wyoming state court has passed upon the issue." 696 F.2d at 93. (Pet. A. 10a) The serious split in authority in other jurisdictions as to the issue is reflected in the Petition at p. 24, n. 20.

* It is not available in Utah. *See Holden* v. *N L Industries, Inc.*, 629 P.2d 428 (Utah 1981).

CONCLUSION

For the reasons set forth in the Petition and herein the petition for a writ of certiorari should be granted.

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APPENDIX

Settlement Agreement and Release of Claims

This Settlement Agreement and Release of Claims is entered into by and between the State of Wyoming ("Plaintiff"), on the one hand, and on the other hand Union Pacific Land Resources Corporation ("UPLRC"), Champlin Petroleum Company ("Champlin"), Union Pacific Corporation, Union Pacific Railroad Company, and Upland Industries Corporation (collectively "Defendants"). It settles and finally resolves all claims by Plaintiff against Defendants in Civil Action No. 69-1372, filed in the Third Judicial District Court of Uinta County, State of Wyoming, on September 24, 1979 ("the Uinta County Case"), and in Civil Action No. 3755, filed in the Third Judicial District Court of Sweetwater County, State of Wyoming, on October 22, 1979 ("the Sweetwater County Case"). This Settlement Agreement and Release of Claims shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

KNOW ALL MEN BY THESE PRESENTS THAT

WHEREAS, Plaintiff has brought suit against Defendants and against Amoco Production Company ("Amoco") in the Uinta County Case and in the Sweetwater County Case, claiming title to minerals in certain lands described in the respective Complaints in those civil actions;

WHEREAS, Plaintiff is the owner of record of the lands described in Exhibit A to this Agreement ("the Uinta County Lands"), subject to a recorded reservation of minerals in favor of Union Pacific Railway Company, its successors and assigns;

WHEREAS, Plaintiff is the owner of record of the lands described in Exhibit B to this Agreement ("the Sweetwater County Lands"), subject to recorded reservations of minerals in favor of Union Pacific Railroad Company, its successors and assigns;

WHEREAS, Plaintiff is not the record owner of and does not now claim any interest in any lands described in the Complaint in the Sweetwater county Case other than those described in Exhibit B hereto;

WHEREAS, UPLRC and Champlin are successors to all right, title, and interest of Union Pacific Railway Company in and to any minerals in the Uinta County Lands, and to all right, title, and interest of Union Pacific Railroad Company in and to any minerals in the Sweetwater County Lands, and, as successors thereto, claim the entire mineral estates in the Uinta County Lands and in the Sweetwater County Lands, respectively;

WHEREAS, the lease from Champlin to Amoco granting oil and gas rights in the Uinta County Lands as alleged in paragraph 10 of the Complaint in the Uinta County Case has been released, and Amoco no longer claims any right, title, or interest in or to the Uinta County Lands or the mineral estate in such lands;

WHEREAS, Plaintiff warrants and represents that it is not aware of any lands that it owns, other than the Uinta County Lands and the Sweetwater County Lands, except those Sweetwater County Lands within the Chain Lakes Big Game Winter Range not described in the Complaint, to be covered by separate agreement, that are subject to mineral reservations in the form of either of the aforementioned recorded reservations in favor of Union Pacific Railway Company and Union Pacific Railroad Company,

respectively, and their respective successors and assigns; and

WHEREAS, Plaintiff and Defendants are desirous of finally resolving by compromise all the matters encompassed in the Complaints in the Uinta County Case and the Sweetwater County Case.

NOW, THEREFORE, in consideration of the covenants herein contained, Plaintiff and Defendants mutually agree as follows:

1. Promptly after entry of both an order of the Third Judicial District Court of Uinta county dismissing the Uinta County Case with prejudice and an order of the Third Judicial District Court of Sweetwater County dismissing the Sweetwater County Case with prejudice;

(a) UPLRC and Champlin will deliver to Plaintiff a quitclaim deed, in the form of Exhibit C, hereto, conveying to Plaintiff all their right, title, and interest in and to the mineral estate, including without limitation any oil, gas, or liquid or gaseous hydrocarbons, in the Uinta County Lands;

(b) Champlin and UPLRC will deliver to Plaintiff a surface owner's agreement, in the form of Exhibit D, hereto, covering the Sweetwater County Lands.

2. Plaintiff waives and relinquishes any and all claim, right, title, and interest to any part of the mineral estates, including without limitation any oil, gas, or associated liquid or gaseous hydrocarbons, in the Sweetwater County Lands.

3. Plaintiff agrees that, in light of this Agreement, it has no interest in any of the pending litigation described

in Exhibit E hereto, or in any suit involving similar challenges to record mineral titles of the Defendants or Amoco or any of their successors by any of the adverse parties in said litigation or by any of their successors.

4. Plaintiff and Defendants will, upon execution of this Agreement, execute:

(a) a Stipulation of Dismissal with Prejudice for the Uinta County Case, together with a proposed order of dismissal in the form of Exhibits F and G hereto, and

(b) a Stipulation of Dismissal with Prejudice for the Sweetwater County Case, together with a proposed order of dismissal in the form of Exhibits H and I hereto,

and Plaintiff will file such Stipulations and proposed orders in, respectively, the Third Judicial District Court of Uinta County and the Third Judicial District Court of Sweetwater County.

5. Plaintiff hereby acknowledges full and complete satisfaction of, and does hereby fully and forever release and discharge the Defendants and Amoco from any and all claims, demands, losses, and liabilities of any kind or nature whatever, whether known or unknown, suspected or unsuspected, concealed or hidden, which Plaintiff now owns or holds or has at any time heretofore owned or held against Defendants or Amoco and which arise out of or are in any way connected with or related to the transactions, rights, occurrences, events, acts or omissions set forth, or the facts alleged in the Complaints filed in the Uinta County Case and the Sweetwater County Case. It is a condition hereof and it is the intention of the parties in executing this instrument that the same shall be effective as a bar to each and every claim, demand, and cause of action

hereinabove specified, but limited to those lands which are the subject of this Agreement.

6. The Plaintiff represents and warrants that it has not heretofore assigned or transferred, or purported to assign or transfer, to any other person or entity any claim or other matter herein released.

7. This instrument effectuates a compromise and settlement of a disputed claim and in no way constitutes an admission by any of the parties of any defect of title or any fault whatever or of any liability whatever in connection with any matter or thing.

Dated this 6th day of May, 1981
State of Wyoming

By /s/ STEVEN F. FREUDENTHAL
Attorney General

Approved:

By /s/ ED HERSCHLER
Governor

Dated this 14th day of April, 1981

Union Pacific Land Resources Corporation
By /s/ D. THOMAS KIDD

Champlin Petroleum Company
By /s/ D. THOMAS KIDD

Union Pacific Corporation
By /s/ D. THOMAS KIDD

Union Pacific Railroad Company
By /s/ D. THOMAS KIDD

Upland Industries Corporation
By /s/ D. THOMAS KIDD

CAHILL GORDON & REINDEL

EIGHTY PINE STREET

NEW YORK, N.Y. 10005

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*ADMITTED D.C. O
**ADMITTED FRANCE

February 6, 1983

Dear Attorney General McClintock:

I very much appreciate the opportunity to offer a final submission — reargument, if you will, — on the question of whether the State of Wyoming may, consistently with the Settlement Agreement it reached with the Union Pacific, submit to the United States Supreme Court a brief amicus curiae on the certification issue we discussed in your office. I premise this submission on the notion that if the State were free to submit such a brief that it would, as you have advised me, do so. I also premise the letter on my understanding that you would not agree to file any brief if in doing so the State violated any commitment duly made on its behalf.

I start with the text of the Agreement itself. Paragraph 3 sets forth the State's agreement, in light of the settlement being reached with respect to Uinta and Sweetwater County Lands (¶¶ 1 and 2), that "it has no interest" in, inter alia, the Moench litigation. What kind of "interest" did the State agree it did not have? Some possible definitions may, I suppose, be quickly dealt with. The State was surely not promising to be apathetic towards or lacking in curiosity about the result of the litigation affecting hundreds of thousands of acres of lands within it properties. Nor, I believe, was it promising to withhold its opinion on general issues of law affecting the citizens of Wyoming which happened to arise in the case, but were in no way dependent on the fact that the State itself had specifi

property interests at issue in the litigation. Issues such as what forum should decide questions on Wyoming law seem to me clearly on that abstract and general level -- although, to be sure, they have practical consequences as do the resolution of all other legal issues.

What ¶ 3 was about, as I view it, was one of two things -- or both of them. At the very least, it was an explicit recognition by the State that it had no property interest in the various litigations between Union Pacific and various third parties, including my clients; in this respect ¶ 3 is the counterpart of the waiver of claims already in litigation between Union Pacific and the State (¶ 2) and was intended to be more specific than the general "catch-all" waiver language of ¶ 5. Beyond any waiver of any property interest, ¶ 3 could also be read at its broadest as barring the State from taking any position on the substantive issues which had been raised in the case commenced by the State itself or perhaps even on the substance of legal issues not raised in the State's case but which were raised in that involving my client. The effect of this reading (which I believe is not only an exceedingly broad one but is subject to the public policy limitations stated below) would be to preclude the State from taking a position on the meaning, under Wyoming law, of reservations of "coal and other minerals" and, perhaps as well, on the issue of whether Section 3 of the Pacific Railway Act was adhered to by the Union Pacific in the years that have passed since the Congressional decision-making process engaged in under President Lincoln.

However broadly one reads the Settlement Agreement, I believe it cannot fairly and properly be read broadly enough to preclude the State from taking a position on the issue of whether, and under what circumstances, Wyoming Stat. 1-13-101 et seq. permitting certification of issues from Federal courts to the Wyoming Supreme Court may and should be utilized. Indeed, it seems to me that even an explicit agreement to that effect, let alone an implied undertaking to such effect, would be impossible to square with notions of public policy. The sovereign simply cannot be estopped from asserting its views as to the enforcement of its own law.

Perhaps a few examples can best illustrate the point. Suppose, for example, that the Union Pacific had opposed certification to the Wyoming courts on the ground that those courts were corrupt or incompetent. Or suppose that my clients had urged that mineral and other subsurface reservations were wholly ineffective in all cases in Wyoming. It would, in my view, be flatly contrary to public policy for the State of Wyoming to

consider itself as being barred from giving its views on either of those issues as a result of the Settlement Agreement. To carry the point one step further, suppose the Supreme Court of the United States itself requested the views of the State of Wyoming on certification. Would the State be barred from responding by its agreement with the Union Pacific? If you conclude it would not, as I believe you would, how would the request alter any contractual obligation, if one exists, barrin the expression of views? It is my conclusion as I go through t exercise provided by these hypotheticals that the State simply could not have intended and, consistent with the proper exercis of power by state officials, may not be considered to have agre to withhold the views of the State in circumstances where, as here, it would otherwise choose to express them.

I know you will consider the matter fully and careful and decide the matter in the best interests of the people of Wyoming. If you believe it would be at all useful, I would be delighted to come to Cheyenne at your convenience to discuss th matter further with you.

Respectfully yours,

Floyd Abrams

Honorable A. G. McClintock
Attorney General of Wyoming
123 State Capitol
Capitol Avenue at 24th Street
Cheyenne, Wyoming 82002

VIA AIR COURIER

cc: Richard Rideout, Esq.

THE STATE OF WYOMING

ED HERSCHLER
GOVERNOR

In reply refer to:

Attorney General

A.G. McCLINTOCK
ATTORNEY GENERAL

CHEYENNE, WYOMING 82002
PHONE 307 777-7841

February 8, 1983

Mr. Floyd Abrams, Esq.
Cahill, Gordon & Reindel
Eighty Pine Street
New York, New York 10005

RE: Moench v. Union Pacific Railroad Co.
Amicus Brief

Dear Mr. Abrams:

The enclosed copy of a letter to Richard Rideout had been written by me but not sent out when I received your recent telephone call. I have now received your letter of February 6, 1983, in which you urge me to reconsider that move. Your arguments are well constructed, but I cannot bring myself to accept the narrow construction of the word "interest" which you place upon that word as used in our contract of settlement with the Union Pacific.

While I am sorry that I was not aware of that contract at the time I talked with you in my office, I cannot accept the argument that we would not be violating the spirit thereof if we filed the amicus brief we discussed. I must, therefore, adhere to my original decision as announced to you over the telephone and decline to participate any further in the case.

Sincerely,

A. G. McClintock
Attorney General

AGM:llc

THE STATE OF WYOMING

ED HERSCH
GOVERNO

In reply refer to:

Attorney General

A.G. McCLINTOC
ATTORNEY GENERA

CHEYENNE, WYOMING 82002
PHONE 307 777-7841

January 31, 1983

Mr. Richard Scott Rideout
Vines, Rideout and Gusea
Deming Building, Suite 305
1620 Central Avenue
Cheyenne, Wyoming 82001

Re: State participation in Amicus Curiae Brief in Moench Investment Company et al. v. Union Pacific Land Resources Corporation et al.

Dear Richard:

At our meeting with Mr. Abrams, Mr. Thompson and you concerning the State of Wyoming submitting an amicus curiae brief in support of the Petition for Writ of Certiorari to be filed by Moench Investment, we peripherally explored the possibility that such activity might violate the terms of the Settlement Agreement entered into between the State and U.P. in the actions which we had filed in Uinta and Sweetwater counties. We have exhumed the Settlement Agreement from the archives and have concluded that it would not be appropriate for the State to submit an amicus brief.

The language of the Settlement Agreement which leads us to the conclusion that state participation would be improper is:

> 3. Plaintiff agrees that, in light of this Agreement, it has no interest in any of the pending litigation described in Exhibit E hereto, or in any suit involving similar challenges to record mineral titles of the Defendants or Amoco or any of their successors by any of the adverse parties in said litigation or by any of their successors.

One of the actions identified in Exhibit E is the Moench case.

I can sympathize with your desire to have the State of Wyoming participate in this matter; however, it appears to me that we are bound by the terms of the Settlement Agreement. Even if it could be argued that filing an amicus brief would not violate the narrow terms of the Agreement, I feel that any participation by the State would ruin our credibility in settling future suits and in subsequent appearances in the United States Supreme Court.

I'm sorry that we will not be able to prepare an amicus brief, for the large question raised concerning the balance of powers as they relate to federalism would have been fascinating to work on.

Sincerely,

A. G. McClintock
Attorney General

AGM:dm

cc: Lee Thompson
Martin, Pringle, Davis,
Oliver and Triplett
300 Page Court, 220 West Douglas
Wichita, Kansas 67202

Floyd Abrams, Esq.
Cahill, Gordon and Reindel
800 Pine Street
New York, New York 10005

Order Accepting Certification of Questions of Law From Federal Court, Giving Notice Thereof, and Directing Briefs and Arguments on an Additional Issue

IN THE

SUPREME COURT

STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5640

SANDRA S. RHODES, *et al.*,

Plaintiffs,

v.

BRADLEY BUSH, *et al.*,

Defendants.

ORDER ACCEPTING CERTIFICATION OF QUESTIONS OF LAW FROM FEDERAL COURT, GIVING NOTICE THEREOF, AND DIRECTING BRIEFS AND ARGUMENTS ON AN ADDITIONAL ISSUE

The United States District Court for the District of Wyoming, having certified the following questions of law to this court for answer pursuant to § 1-13-104, W.S. 1977:

"(a) What is the effect of the apparently inadvertent repeal of Wyoming's Wrongful Death Statutes, W.S. 1977, § 2-14-201-202, by Chapter 151, Section 3, Session Laws of Wyoming, 1981?

"(b) Are litigants in Wyoming, including the Plaintiffs in the above-entitled action, now without a remedy for claims for damages for wrongful death brought, under 42 U.S.C. 1983 and 1988 in view of the common law rule

> that actions for personal injuries including wrongful death, do not survive the death of the person injured by the alleged tort?",

and it appearing to the United States District Court for the District of Wyoming that there is no controlling precedent on the point, it is

ORDERED that said certification be, and the same hereby is, accepted by this court for answer to such questions, and it is

FURTHER ORDERED that the clerk of this court furnish a copy of this order to each of the present parties to this action by transmitting the same to their attorneys of record by registered mail, return receipt requested, and that the same be notice to them of such acceptance for the purpose of setting times for briefs and oral arguments pursuant to Rule 11.06, W.R.A.P., and it is

FURTHER ORDERED that such briefs and oral arguments address the following additional question:

> Whether § 8-1-107, W.S. 1977 and Matter of Estate of Boyd, Wyo., 606 P.2d 1243 (1980), cause this case to be subject to the provisions of the Wyoming Wrongful Death Act which was in effect when the cause of action arose.

Dated January 8, 1982.

* By the Court:

/s/ R. R. ROSE, JR.
ROBERT R. ROSE, JR.
Chief Justice

Filed: January 8, 1982

Appendix

* RAPER, Justice.

I join in the foregoing order but wish to make some observations. The questions presented are interlocutory, that is they are questions raised during litigation and not in connection with a final disposition of the case, where the only question remaining after trial is whether there is an applicable wrongful death statute. We would in all likelihood not consider the questions at the stage of the pending case if it were one before one of the district courts of Wyoming, on an interlocutory appeal, that is to say in a case not yet finally concluded through trial. This court has repeatedly held that a judgment or order which determines the merits of a controversy and leaves nothing for future consideration by the trial is final and appealable, and it is not appealable unless it does those things. Public Service Commission v. Lower Valley Power and Light, Inc., Wyo., 608 P.2d 660 (1980); Arp v. State Highway Commission, Wyo., 567 P.2d 736 (1977).

The legislature was aware of that well-known appellate doctrine when it enacted § 1-13-106, W.S. 1977:

> "The supreme court *may* answer questions of law certified to it by a federal court when requested by the certifying court if there are involved in any proceeding before the *federal court questions of law of this state which may be determinative of the cause then pending in the federal court,* and as to which it appears to the federal court there is no controlling precedent in the existing decisions of the supreme court." (Emphasis added.)

I can agree that if we decide the statute was repealed, then that would "be determinative" of the case pending in federal court and the plaintiffs' complaint there dismissed, unless

the statute was in effect and still viable for the purposes of a cause arising in 1979, prior to any repeal, if it was in fact repealed. The latter possible alternative is the thrust behind the question this court presents in addition to the one posed by Judge Brimmer.

We may decide one way or another that the statute is in effect. In that event, then the federal case would go to trial. If the plaintiff failed, as administrator, to prove her case or it is settled somewhere along the line, then we have needlessly decided that the statute was in effect for the purposes of this particular case or was not repealed. There is a big jump between alleging a cause of action and proving it. That is the reason this court has insisted upon a case being completely disposed of in the trial court before we will consider it on appeal. The same concept would apply to certified questions from a federal court.

I have great respect for the position taken by Judge Brimmer that he has a question which ought to be decided by this court. State courts should decide questions of state law. I also agree that it ought to be decided now, in order to settle a question which has been nagging not only the United States District Court but some of the state district courts.

It should be noted that in the cases cited above, I have dissented because I thought some interlocutory questions were important enough for us to decide and perhaps save the wasted time of a trial. I am hopeful that we are setting a new precedent for the consideration of interlocutory questions, the answer to which may be dispositive of a case at an early stage. I gave up dissenting and have watched and joined in many orders where this court refuses to move from the adamant concepts expressed in Public Service

Commission and Arp, supra. I see no reason to treat an interlocutory question from a federal court any differently than an interlocutory question from a state district court.

CERTIFIED TRUE COPY:

/s/ RITA M. WHITE,
RITA M. WHITE, CLERK
WYOMING SUPREME COURT
Dated at Cheyenne, Wyoming,
this 28th day of April 1982.